Supreme Court, U.S.
FILED
JAN 4 1993
OFFICE OF THE CLERK

92-1158

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

KAREN M. PHELAN AND CHARLENE PHELAN,
AS CO-ADMINISTRATORS OF THE
ESTATE OF SHANE P. PHELAN,
DONALD V. FITZGERALD AND MARK COTTON
PETITIONERS,

V.

LOCAL 305 OF THE UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES
OF THE UNITED STATES AND CANADA
AND TERRENCE QUINN
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 31, 1992

QUESTIONS PRESENTED

1. Whether a union member, who was denied job referrals by the business manager of a "sister" union local and by the "sister" local itself as part of a scheme to suppress dissent within the union, can bring an action against the business manager and/or the "sister" local under the Labor Management Reporting and Disclosure Act, 29 U.S.C. Sections 411 and 412 ("LMRDA")?

PARTIES

The following were parties to the proceedings below: Patrick Quinn; the United Association of the Plumbing and Pipefitting Industry of the United States and Canada; the Mechanical Contractors Association of Connecticut, Inc.; the Eastern Connecticut Mechanical Contractors Association, Inc.; the Stone & Webster Engineering Corporation; also, Terrence Quinn and Local 305 of the United Association of the Plumbing and Pipefitting Industry of the United States and Canada and the plaintiffs.

This writ concerns only the plaintiffs and defendants Terrence Quinn and Local 305.

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OPINIONS BELOW

Just before trial, the District Court denied a Motion to Dismiss filed by respondents Local 305 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("Local 305" of the "United Association") and Terrence Quinn. The District Court's opinion is unreported. It is reproduced at pages 68a to 81a of the Appendix ("App."). The case then went to trial under the LMRDA and resulted in plaintiffs' verdicts. After trial, the trial court refused to overturn the verdicts. App. 82a to 122a. However, on August 25, 1992 the Court of Appeals for the Second Circuit reversed the trial court and overturned the jury verdicts on jurisdictional grounds. The Second Circuit's opinion is reported. See Phelan

v. Local 305, 973 F.2d 1050 (2d Cir. 1992). App. 1a to 65a.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Second Circuit was filed on August 25, 1992. App. 1a to App. 65a. The Court of Appeals denied a petition for rehearing on October 5, 1992. App. 66a. This Court has jurisdiction under 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

29 U.S.C. 411, known as the Labor Management Reporting and Disclosure Act, states as follows:

> **(a)(1) Equal Rights** Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor

organization, to attend membership meetings, and to participate in the deliberations and voting upon business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(a)(2) Freedom of Speech and Assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations...

(a)(4) Protection of the Right to Sue. No labor organization shall limit the right of any

member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a 4-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

29 U.S.C. 412 states as follows:

Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United

> States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

STATEMENT OF THE CASE

A. FACTS

The petitioners were construction plumbers and journeymen members of Local 76 of the United Association, based in Hartford, Connecticut. The business manager of Local 76 was Patrick Quinn. Local 305 of the United Association was a "sister" local of Local 76. It was based in Uncasville, Connecticut (about forty miles from Hartford). Its business manager was Terrence Quinn, Patrick's brother.

Each local within the United

Association is responsible for all union activities within its geographical jurisdiction, including job referrals, and there is a close relationship between and among the various locals of the United Association. This relationship was created by the United Association's constitution, and the constitution regulates all aspects of the traveling system.

Pursuant to the constitution, when a United Association member travels to a "sister" local, the member looks to the "sister" local for union protection even before the member gets a job. The traveler must pay $6.00 a week to the "sister" local for the right to deposit his or her travel card. After getting a job through the "sister" local, he or she must agree to a dues check-off in favor of the "sister" local. The traveler is bound to

follow the practices and policies of the "sister" local and to submit to the jurisdiction of the "sister" local for disciplinary matters. In return, the traveler gets to attend union meetings at the "sister local," though not to vote; and the traveler receives all the rights and on-the-job protections of a full member of the "sister" local.

Members of Local 76 frequently went to Local 305 to work. This was because Local 305 (and Terrence Quinn) controlled all job referrals to the construction sites of three nuclear power plants, Millstone I, II and III. The Millstone plants for twenty years were the largest construction projects in the Northeast.

Over the course of a number of years, the petitioners earned the enmity of Patrick and Terrence Quinn and Local 305 because the petitioners had exercised

their rights guaranteed to them by Title I of the Labor Management Reporting and Disclosure Act ("LMRDA"). The petitioners had filed NLRB charges directly against Local 305, as well as Local 76; they had spoken out at union meetings in Local 76; and they opposed Patrick Quinn's reelection to union office. It was established at trial that Terrence Quinn saw himself as "victimized" by the petitioners' democratic activity and that he considered their activities a "festering boil." To retaliate against the petitioners, and to chill the rights of all union members, Terrence Quinn and other officers and employees of Local 305 turned the petitioners away when they sought work through Local 305's hiring hall.

When this case went to trial, the jury decided by the clear and convincing

evidence standard that the respondents had engaged in a scheme to suppress dissent; that the respondents' participation in the scheme was responsible for the petitioners losing wages; and that the respondents had engaged in the scheme with reckless or wanton indifference to the petitioners' LMRDA rights. The jury then awarded the petitioners nearly a half million dollars in compensatory and punitive damages.

B. PROCEEDINGS BELOW

On December 3, 1985, the petitioners sued the respondents and their co-defendants in the United States District Court for the District of Connecticut under the LMRDA, 29 U.S.C. Section 411 and 412 and under the Labor Management Relations Act ("LMRA"), and pursuant to state jurisdiction. On May 17, 1990, the District Court granted summary judgment

for the defendants on all counts except the LMRDA counts.

As this matter went to trial, each of the petitioners had LMRDA claims against Terrence Quinn and Local 305. In addition, Fitzgerald had an LMRDA claim against Patrick Quinn.

On November 7, 1990 the magistrate judge handling the case denied a motion to dismiss which had been filed by respondents Terrence Quinn and Local 305. The respondents had argued that the court lacked jurisdiction over petitioners' claims because the petitioners were not members of Local 305.

On November 16, 1990, the jury returned a liability verdict in petitioners' favor. After a seven-day damages trial, the jury awarded back pay and punitive damages on all counts. Judgment was entered in favor of the

petitioners on October 1, 1991.

The case was appealed to the Court of Appeals for the Second Circuit by the respondents, pursuant to 28 U.S.C. Section 1291. On August 25, 1992, the Court of Appeals reversed the trial court on the issue of LMRDA jurisdiction. The Court of Appeals ruled that the LMRDA did not permit the petitioners, as Local 76 members, to sue Terrence Quinn or Local 305. In so doing, the Court of Appeals for the Second Circuit discussed and rejected the reasoning of a Seventh Circuit case, Harris v. Plasterers & Cement Masons Local No. 406, 619 F.2d 1164 (7th Cir. 1980).

The petitioners sought a rehearing, but it was denied on October 5, 1992.

The decision of the Second Circuit, if allowed to stand, will greatly limit application of the LMRDA in all cases in

which hiring or referral halls are used. This includes most of the construction unions in the country.

REASONS FOR GRANTING THE WRIT: THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT CONFLICTS WITH OTHER CIRCUITS, AND IT INCORRECTLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

A. SUMMARY OF ARGUMENT:

The Second Circuit's decision below is a major cutting back of the LMRDA. It threatens to eliminate the LMRDA as an instrument of union democracy in the construction industry.

The Second Circuit's decision also expressly conflicts with the Seventh Circuit inasmuch as the Second Circuit declined to follow Harris v. Plasterers & Cement Masons Local No. 406, 619 F.2d 1164 (7th Cir. 1980) on the issue of LMRDA jurisdiction. Harris had held the LMRDA

can be used by a union member to sue a "sister" local and its officers. The Second Circuit held it could not.

Though not as explicit, the Second Circuit's decision also conflicted with decisions in other circuits and in this court holding that the LMRDA a) can be used to sue persons acting under color of union authority, at least b) where the defendant has engaged in a scheme to suppress dissent.

B. DETRIMENTAL IMPACT ON THE LMRDA.

This court has granted certiorari in LMRDA cases even in the absence of conflict between circuits because of the great importance of issues "concerning the internal governance of Labor unions." Sheet Metal Workers v. Lynn, 488 U.S. 347, 348, 109 S. Ct. 639, 102 L.Ed 2d 700, 706 (1989). This case is also a case which

raises such issues of great importance.

The trial court below had recognized:

> The democratic processes established by the LMRDA would be nullified if union officers were allowed to suppress dissent indirectly by inhibiting the job referral process through sister locals. The LMRDA "does not allow [a] union to achieve indirectly what it is prohibited to do directly." Duncan v. Peninsula Shipbuilders Ass'n, 394 F.2d 237, 240 (4th Cir. 1968).

App. 101a. But the decision of the Second Circuit opened up a loophole in the LMRDA wide enough to drive a bulldozer through.

The Second Circuit did great damage to the LMRDA by expressly removing LMRDA jurisdiction from all but direct efforts to suppress dissent. Starting with the view that the LMRDA has "limited jurisdictional reach," App. 20a, the court selected the more restrictive of two choices, and this was the basis of the Second Circuit's decision. The court had

been presented with perfectly logical reasons for affirming the jury's verdicts on liability, and the court recognized the only precedent extant (Harris) had gone in that direction, but it opted for a narrow construction of the LMRDA.

What the trial court feared will likely come to pass. From now on, if the Second Circuit's rule is allowed to stand, union despots in the construction industry -- where traveling to "sister" locals is part and parcel of one's working life -- will be able to scheme with cohorts in other union locals to suppress dissent by depriving dissidents of work outside their home locals. Though indirect, it would be hard to think of a more effective way for such despots to chill the democratic rights of union members, and thus frustrate the central purpose of the LMRDA. Hall v. Cole, 412 U.S. 1, 8, 93 S.

Ct. 1943, 36 L.Ed. 2d 702 (1973).[1]

C. **EXPLICIT CONFLICT BETWEEN SECOND AND SEVENTH CIRCUITS.**

This case presents a clear, explicit and irreconcilable conflict between the Second and Seventh Circuits. The conflict is over an issue of great public importance that should be resolved by the U.S. Supreme Court.

The decision of the Second Circuit below expressly declined to follow Harris v. Plasterers and Cement Masons Local No. 406, 619 F.2d 1164 (7th Cir. 1980). As

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[1] The Second Circuit stated that its ruling "generally" would not "hobble" plaintiffs. App. 20a. It cited to the fact that the petitioners had won related NLRB cases. But the Second Circuit overlooked the fact that this court and Congress has recognized that the NLRB, for a variety of reasons, does not provide adequate protection against union tyranny. Reed v. United Transportation Union, 488 U.S. 319, 332, 488 S.Ct. 621, 629-630, 102 L.Ed. 2d 665 (1989).

already discussed, the Second Circuit's holding was that a member of a union local cannot use the LMRDA to sue a "sister" local or the officers of the "sister" local. In refusing to follow Harris, the Second Circuit explicitly rejected the reasoning of the Seventh.

Harris was a case in which members of Locals 16 and 101 of the Operative Plasterers' and Cement Masons' International Association sued Local 406 of the same international union. The plaintiffs were travelers working under the jurisdiction of Local 406 and had been illegally fined for not joining a walkout of Local 406 members. They were expelled from the international union for not paying the fines. After the trial court found for the plaintiffs, Local 406 appealed, claiming that "this action under 29 U.S.C. Section 412 could not be brought

against Local No. 406 because plaintiffs were not members of that organization." 619 F.2d at 1166.

In rejecting the Local's argument, the Seventh Circuit noted the presence of many of the same factors that favor LMRDA jurisdiction in the case at bar. The Seventh Circuit relied upon the fact that the union members and Local 406 operated under the same constitution, and that the constitution regulated the traveling system which allowed "members of one local [to] work in the jurisdiction of another local." 619 F.2d at 1166. The court also noted that the constitution regulated disciplinary processes and internal appeals. In holding that there was LMRDA jurisdiction, the Seventh Circuit said:

> We have no difficulty in concluding ... that if Local No. 406 violated Section 411(a)(5), Section 412 gave plaintiffs a right of action.

> [P]laintiffs are seeking redress from defendant local for injuries...caused by improper acts of defendant local in exercising power delegated to it by the constitution of the International.

619 F.2d at 1167.

In the instant case, the Second Circuit rejected these same arguments. The court below stated:

> We decline to follow Harris. We find it inconsistent with both the limited jurisdictional reach afforded us by the LMRDA and our cases refusing to entertain suits by plaintiffs against employers who allegedly had colluded with unions.

App. 20a.

The conflict between circuits could not be sharper.

D. CONFLICT WITH CASES HOLDING THAT LMRDA PROVIDES A CAUSE OF ACTION AGAINST ALL PERSONS PARTICIPATING IN A SCHEME TO SUPPRESS DISSENT.

The Sixth Circuit held in Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980) that any person who participates in a scheme to suppress union dissent is liable to his victims under the LMRDA. Shimman, 625 F.2d. at 90-91, 94. In Shimman, union members who were not officials, and a union official who was not a participant in the deed designed to silence the plaintiffs, were all liable under the LMRDA. The Sixth Circuit held that when an individual engages in a scheme, or conspiracy, "to intimidate the dissidents and cower them into silence," each participant is liable under the LMRDA for the "foreseeable result of events [which he] deliberately set in motion." 625 F.2d at 90-91.

In dicta, the U.S. Supreme Court has expressed a view similar to Shimman. This court has stated that a claim that would otherwise not be actionable under the LMRDA might become so if the action contested were "part of a purposeful and deliberate attempt...to suppress dissent within the union." Finnegan v. Leu, 456 U.S. 431, 441, 102 S.Ct. 1867, 72 L.Ed 2d 239 (1982) (holding that appointed union officials do not have LMRDA protection against removal from office).

But in the case below, the Second Circuit rejected the reasoning of the Sixth Circuit and the dicta of this court. Even though the jury had expressly found that both Terrence Quinn and Local 305, along with Patrick Quinn, had operated in a scheme to suppress dissent, the Second Circuit held that both Terrence Quinn and

Local were beyond the reach of the LMRDA.[2]

E. CONFLICT WITH CASES HOLDING THAT LMRDA PROVIDES A CAUSE OF ACTION AGAINST PERSONS ACTING UNDER COLOR OF UNION AUTHORITY.

Before this case, the Second and Fifth Circuits had both extended LMRDA jurisdiction to include defendants who had acted under the color of union authority to suppress union dissent. Morrissey v. NMU, 544 F. 2d 19, 24 (2d Cir. 1976) (individuals acting under color of union authority can be liable under the LMRDA). Keene v. International Union of Operating Engineers, 569 F.2d 1375, 1381 (5th Cir. 1978) (union official who manipulated

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[2] The Second Circuit stated at App. 18a that the petitioners disavowed an agency theory. This is misleading. It is true that the petitioners did not contend that Terrence Quinn and Local 305 were Patrick Quinn's agents, but the petitioners did claim that all three were co-conspirators. The jury agreed.

hiring hall was liable individually under the LMRDA).

But in this case, the court below refused to recognize LMRDA jurisdiction even though both Terrence Quinn and Local 305 were acting under the authority granted to them by the constitution of the international union, the United Association. It was this same constitution which conferred union status on the petitioners; which conferred legal status on the petitioners' home local (Local 76); and which created and regulated the hiring hall system.

In the case of Terrence Quinn, his ability to prevent the plaintiffs from working at Millstone directly derived from the power and authority which flowed to him from the United Association's constitution. In the case of Local 305, its very existence confirms that it was

operating under color of union authority.

The decision below is, in effect, a reversal of Morrissey on the issue of individual liability. It is the constitution of an international union which regulates and legitimizes all union authority. The authority of a local official derives from the international's, and is delegated to him or her by the constitution. Thus, if any local union official can be a proper LMRDA defendant, Terrence Quinn must be too, since he was acting under color of precisely the same union authority that Patrick Quinn was. But if Terrence Quinn can not be held liable, there is no logical reason why any union official should be held liable.

The Second Circuit's backing away from its long-standing rule that an individual acting under color of authority can be sued under the LMRDA logically puts

the Second Circuit on a collision course with the Fifth Circuit, and with the Second Circuit's own precedent, on the issue of liability of union officials.

It is this same backing away that caused the Second Circuit to be unable to distinguish this case from cases where employers had been sued. App. 20a. The obvious reason why employers cannot be sued under the LMRDA, but why "sister" locals and their leaders can be, is that in the latter situations the defendants were acting under color of union authority. Employers never are, so in cases against employers the LMRDA's central purpose of promoting union democracy can never become an issue.

F. CONCLUSION

The Second Circuit's decision below conflicts with other circuits and departs

from accepted LMRDA jurisprudence which has guided this court and the courts of other circuits. In the process, the Second Circuit decision did serious damage to the LMRDA and to the national objective of promoting union democracy. It is for these reasons that the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Karen M. PHELAN, as Administrator of the Estate of Shane P. Phelan, Charlene Phelan, as Co-Administrator of the Estate of Shane P. Phelan, Donald V. Fitzgerald, Mark Cotton,

Plaintiffs-Appellees, Cross-Appellants,

v.

LOCAL 305 OF the UNITED ASSOCIATION OF JOURNEYMEN, AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF the UNITED STATES AND CANADA, Patrick Quinn, Terrence Quinn,

Defendants-Appellants, Cross-Appellees,

United Association of the Plumbing and Pipefitting Industry of the United States and Canada,

Defendant- Cross-Appellee,

Mechanical Contractors Association of Connecticut, Inc., Eastern Connecticut Mechanical Contractors Association, Inc. and Stone & Webster Engineering,

Defendants.

Before: MESKILL, Chief Judge, NEWMAN, Circuit Judge, and ARCARA, District Judge. [1]

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1 Honorable Richard J. Arcara, United States District Judge for the Western District of New York, sitting by designation.

MESKILL, Chief Judge:

On this appeal and cross-appeal from a judgment entered on jury verdicts in the United States District Court for the District of Connecticut, Clarie, we must decide whether Title I of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. s 411 et seq., also known as the LMRDA Bill of Rights, grants us jurisdiction to hear suits brought by plaintiffs who were members of Local No. 76 (Local 76) of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (United Association), against a sister local and one of its officers. We also address, inter alia, the appropriate limitations period for counts alleging a breach of the duty of fair representation, violations of the LMRDA Bill of Rights and breaches

of union constitutions. Affirmed in part, reversed in part and remanded to the district court for further proceedings not inconsistent with this opinion.

BACKGROUND

Plaintiffs Phelan, Fitzgerald and Cotton were members of defendant Local 76, one of United Association's chartered locals. When work was unavailable within Local 76's geographic jurisdiction, plaintiffs would travel to the jurisdiction of defendant Local No. 305 (Local 305), another of United Association's chartered locals. Local 305 operated a hiring hall that referred workers to employers under the terms of collective bargaining agreements between Local 305 and employers in its area. Plaintiffs sought work through that hiring hall.

Defendant Mechanical Contractors'

Association of Connecticut (MCAC) is the collective bargaining representative of construction contractors doing business in Connecticut. It has entered into collective bargaining agreements with the United Association and its local chapters in the State of Connecticut.

Defendant Eastern Connecticut Mechanical Contractors' Association (ECMCA) is the MCAC's agent for collective bargaining in Local 305's geographic jurisdiction.

Defendant Stone & Webster Engineering Corp. (Stone & Webster), a member of both ECMCA and MCAC, was for a number of years the largest employer of Local 305 members. It employed them to work at the Millstone Point Nuclear Power Facility (Millstone) in Waterford, Connecticut. Because of the size of the Millstone project, Stone & Webster's need for plumbers at times exceeded Local 305's

membership. When that occurred, members of other United Association locals who had registered with Local 305's hiring hall by signing the out-of- work book were referred to Millstone for work.

Defendant Patrick Quinn was Business Manager of Local 76 from June 1982 through June 20, 1985. During all times relevant to this action Terrence Quinn, Patrick Quinn's brother, was Business Manager of defendant Local 305.

In April 1982, Phelan nominated Fitzgerald to oppose Patrick Quinn in the June 1982 election for the position of Local 76's Business Manager. Despite Phelan's active campaigning on Fitzgerald's behalf, Quinn won reelection.

In October 1982, Fitzgerald went to Local 76's hiring hall and requested that he be referred to work at Millstone. Patrick Quinn responded to the request,

telling Fitzgerald in effect that he had no problem with that as long as Fitzgerald "got out of his face on the union floor"--that is, remained quiet at meetings. Fitzgerald agreed and, within a week, Fitzgerald received a referral to Millstone. Apparently, however, Fitzgerald's acquiescence did not last long.

Testimony at trial showed that Patrick Quinn resented Fitzgerald's continued opposition during 1983 and later and that he had stated that he would get even with Fitzgerald for causing him difficulty within the union. To this end, Patrick Quinn walked around union meetings jotting down notes to himself when members would agree with what Fitzgerald said. According to one witness, Patrick Quinn had stated that he could hurt union members who made derogatory remarks about

him by affecting their ability to work at Millstone.

Patrick Quinn's opportunity for revenge was his ability to affect hiring hall referrals and to control the work that Local 76's members obtained. Members of Local 76 obtained work at Millstone by procuring a travel card from Patrick Quinn and registering with Local 305 through Terrence Quinn. Testimony indicated that Patrick Quinn had boasted that he and his brother Terrence controlled Millstone.

On January 18, 1985 Fitzgerald was laid off from a job that he held at Stone & Webster. Many others were laid off at this time as well.

On February 27, 1985, Phelan, Cotton and Fitzgerald attempted to register for work at Millstone by signing the out-of-work book at Local 305's hiring

hall. Officials at the hall refused to allow them to sign the out-of-work book, and the three thus were unable to get the work that they had sought. Telephone records revealed that someone made a telephone call from Local 305 to Local 76 on that day during the time when plaintiffs were at Local 305.

From the Local 305 hiring hall, plaintiffs proceeded to the National Labor Relation Board's (NLRB) Hartford office where they filed unfair labor practice charges against Local 305. Plaintiffs prevailed before the Administrative Law Judge (ALJ). The NLRB affirmed the ALJ's decision, and in an unpublished order we enforced the NLRB's order.

In March 1985, Phelan, on behalf of himself, Cotton and Fitzgerald, wrote to the international union, United Association, about their problems. By

letter dated April 2, 1985, United Association's president informed plaintiffs that their travel cards would be accepted by Local 305 if presented. Despite this assurance, plaintiffs did not attempt to register with Local 305 until June 25, 1985. In the interim, events that are significant to this appeal occurred.

Phelan and others ran against Patrick Quinn in the June 1985 election for Local 76's Business Manager. Patrick Quinn was defeated and ceased serving in that position on June 20, 1985.

On June 3, 1985, Phelan, Cotton and Michael Napolitano, who is not a party to this action, entered into an agreement with Local 76 to settle NLRB charges. In that agreement, Phelan and Cotton released Local 76's officers and agents--including Patrick Quinn--from all liability for

actions that were or may have been within the scope of those charges and that occurred prior to the date of the agreement.

On June 10, 1985 at least one person was referred to work through the hiring hall. Thereafter, on June 25, 1985, plaintiffs registered with Local 305 for work at Millstone by signing an out-of-work book. They claim that they were given a different out-of-work book to sign than the one from which referrals regularly took place.

On December 3, 1985, Phelan, Fitzgerald and Cotton brought the present action. Their complaint, as subsequently amended, set forth a number of allegations. Counts One through Four were brought against Patrick Quinn, Terrence Quinn, United Association and Local 305. Count One alleged a breached

of the duty of fair representation. Count Two alleged wrongful discipline in violation of 29 U.S.C. s 529. Count Three claimed that defendants conspired to deny plaintiffs rights guaranteed them under the LMRDA Bill of Rights, id. s 411 et seq. Count Four alleged that defendants violated section 301 of the Labor Management Relations Act (LMRA), id. s 185, by breaching the United Association's constitution and the locals' bylaws. Count Five alleged that all seven defendants, in violation of section 301 of the LMRA, breached both (1) the Collective Bargaining Agreement between Local 305 and the MCAC and ECMCA, and (2) the Rules and Regulations of the Joint Hiring Committee. Counts Six through Eleven set forth a number of pendent state claims. Subsequently, the claims against MCAC and ECMCA were withdrawn.

In the district court's May 17, 1990 ruling, it granted summary judgment to United Association and Stone & Webster on all counts. It granted summary judgment to Terrence Quinn and Patrick Quinn on all but the Count Three LMRDA claims. Counts One, Four and Five were dismissed as against United Association and Local 305 on statute of limitations grounds, and as against Patrick and Terrence Quinn on grounds not at issue in this appeal. Counts Two and Six through Eleven were dismissed against all defendants on other grounds not at issue in this appeal.

Remaining for trial were (1) Fitzgerald's Count Three LMRDA Bill of Rights claim against Patrick Quinn, and (2) Phelan's, Fitzgerald's and Cotton's Count Three LMRDA Bill of Rights claims against Local 305 and Terrence Quinn. With the consent of the parties, Judge

Clarie referred the matter to Magistrate Judge Eagan for all further proceedings and entry of judgment. The claims were tried before a jury in a bifurcated proceeding. On November 16, 1990, the jury returned a liability verdict in plaintiffs' favor. After a seven day damages trial, the jury awarded (1) back pay and punitive damages in favor of Fitzgerald against Patrick Quinn, and (2) back pay and punitive damages in favor of all three plaintiffs against Local 305 and Terrence Quinn. After subsequent rulings and entry of final judgment, this appeal followed.

DISCUSSION

A. Subject Matter Jurisdiction Over LMRDA Claims

Defendants Local 305 and Terrence Quinn contend on appeal, as they did below, that the district court lacked

subject matter jurisdiction over the LMRDA claims brought against them. They assert that Title I of the LMRDA, 29 U.S.C. s 411 et seq. (Title I), grants federal courts only the limited authority to hear suits by plaintiffs against a union of which plaintiffs are members or that union's officers. The district court rejected this argument and held that it had subject matter jurisdiction over the claims because Title I is equally applicable when a sister union, or its agents, infringes on protected rights. We disagree with the district court. The LMRDA claims should be dismissed for lack of subject matter jurisdiction.

Title I guarantees "to [union] members equal rights and freedom of speech in the conduct of union affairs." Abrams v. Carrier Corp., 434 F.2d 1234, 1250 (2d Cir.1970) (emphasis added), cert. denied,

401 U.S. 1009, 91 S.Ct. 1253, 28 L.Ed.2d 545 (1971); see 29 U.S.C. s 411(a)(1) ("Every member of a labor organization shall have equal rights and privileges within such organization ... to vote.") (emphasis added); id. s 411(a)(2) ("Every member ... shall have the right to meet and assemble freely ... and to express any views.") (emphasis added). To shelter these liberties, section 102 provides that "[a]ny person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States." Id. s 412 (emphasis added). Therefore, a plaintiff may proceed with a section 102 suit only if rights secured by Title I have been infringed.

Congress did not intend Title I of the LMRDA to create a panoply of rights to

which all persons injured in some way relating to a union may turn when seeking redress. See Abrams, 434 F.2d at 1250 ("Title I ... is not a catch-all into which might be swept all manner of miscellaneous charges.") (citations omitted); cf. Finnegan v. Leu, 456 U.S. 431, 102 S.Ct. 1867, 72 L.Ed.2d 239 (1982) (section 101 does not protect job security or tenure of union officers or employees as such). Rather, as this Circuit has "consistently held," Thompson v. New York Central Railroad Co., 361 F.2d 137, 145 (2d Cir.1966), Title I "regulates only the relationship between the union and its members," id., not other relationships, see id.; Abrams, 434 F.2d at 1250 (citing Thompson).

Because Title I only governs the relationship among unions and their members, and section 102 only allows a

litigant to seek redress for an infringement of rights secured under Title I, see Finnegan, 456 U.S. at 439, 102 S.Ct. at 1872, we have held that we have subject matter jurisdiction to hear only those suits brought by plaintiffs against unions rather than employers, see Thompson, 361 F.2d at 145; Abrams, 434 F.2d at 1250, or against union officials, see Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10, 605 F.2d 1228, 1246 (2d Cir.1979), cert. denied, 446 U.S. 919, 100 S.Ct. 1853, 64 L.Ed.2d 273 (1980); Morrissey v. National Maritime Union of America, 544 F.2d 19, 24 (2d Cir.1976), or against an international union that ratifies the unlawful acts of one of its affiliated locals, see Rodonich v. House Wreckers Union Local 95, 817 F.2d 967, 972-73 (2d Cir.1987). Accordingly, an employee has no claim

against his or her employer under section 102, despite an allegation of collusion between the employer and the union. Thompson, 361 F.2d at 145. Similarly, courts have refused to entertain suits by plaintiffs against unions that have rejected them for membership, see Vincent v. Plumbers & Steamfitters Local No. 198, 384 F.Supp. 1379 (M.D.La.1974), or refused them transfers, see Gavin v. Structural Iron Workers Local No. 1, 553 F.2d 28 (7th Cir.1977). Although "agents" of a union in which plaintiffs are members may be subject to suit under the LMRDA, Thompson, 361 F.2d at 145, plaintiffs expressly disclaim an agency theory in this case.

At least one court has entertained a suit brought against a sister local. See Harris v. Plasterers & Cement Masons Local No. 406, 619 F.2d 1164 (7th Cir.1980).

In Harris, an employer in Local No. 406's (Local 406) geographic jurisdiction needed workers for a job and hired the plaintiffs, who were members of the international union and other locals but were not members of Local 406. Subsequently, Local 406 fined them $500 each because plaintiffs had crossed a picket line. Plaintiffs did not appeal or pay the fine and, in accordance with the international union's constitutional provision on nonpayment of fines, were expelled from the international and the locals of which they had been members.

The plaintiffs sued Local 406, basing their claims on the LMRDA. The defendants argued to the Seventh Circuit that the action could not be brought against Local 406 because the plaintiffs were not "members" of that organization. The court rejected this argument noting

that plaintiffs were "seeking redress from defendant local for injuries to their rights of membership in the affiliated international and other locals, caused by improper acts of defendant local in exercising power delegated to it by the constitution of the International." Id. at 1167.

We decline to follow Harris. We find it inconsistent with both the limited jurisdictional reach afforded us by the LMRDA and our cases refusing to entertain suits by plaintiffs against employers who allegedly had colluded with unions. The LMRDA "regulates only the relationship between the union and its members," Thompson, 361 F.2d at 145, and does not grant us power to hear a claim against other unions or their officers.

This rule generally will not hobble

plaintiffs.[2] Other statutes reflect the congressional policy that unions and their officers should not be allowed to utilize the job referral process to thwart membership rights in other unions. For example, sections 8(b)(1)(A) and 8(b)(2) of the LMRA, 29 U.S.C. s 158(b)(1)(A), (b)(2), prohibit discriminatory referrals by a local against nonmembers, see International Brotherhood of Electrical Workers, Local 211 v. NLRB, 821 F.2d 206, 210-11 (3d Cir.1987), or travelers, see International Association of Bridge, Structural and Ornamental Iron Workers, Local 111 v. NLRB, 792 F.2d 241, 244-45 (D.C.Cir.1986). Similarly, an individual

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[2] In this case, for example, plaintiffs in fact prevailed in the NLRB proceeding against Local 305, and could have brought an LMRDA action against Local 76 had their settlement with Local 76 not precluded such an action.

who suffers discrimination in the operation of a hiring hall may maintain an action alleging breach of the duty of fair representation. See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 88, 110 S.Ct. 424, 437, 107 L.Ed.2d 388 (1989) ("Together with [the authority to refer workers for employment through a hiring hall] comes the responsibility to exercise it in a nonarbitrary and nondiscriminatory fashion."). With that said, we turn to whether plaintiffs were members of Local 305 for purposes of pursuing their LMRDA claims.

The LMRDA defines a member in a labor organization as "any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended." 29

U.S.C. s 402(o). "The definition of 'member' within [section 402(o)] is not limited to those persons who are recognized as members by the organization." Basilicato v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, 479 F.Supp. 1232, 1242 (D.Conn.1979), aff'd, 628 F.2d 1344 (2d Cir.1980). Rather, we focus on whether plaintiffs have fulfilled the requirements of membership. Id. Thus, that "union officials have not performed the ministerial acts necessary to give formal recognition to a person's status as a member" is not determinative. Id. (citation omitted).

We therefore look to whether an individual has satisfied or sought to satisfy the requirements of the union at

issue to determine whether he is a "member" for LMRDA purposes.

Membership in Local 305 is governed in part by the United Association's constitution. Under the terms of that constitution, it is clear that plaintiffs were not full members of Local 305. Section 229 of the United Association's constitution establishes the privileges and procedures that apply to members of the international who seek to work outside the jurisdiction of their local union. These individuals, referred to as "travelers," retain their membership in their "home" local, to which they continue to pay dues. See United Association Constitution s 229(f) ("When a member deposits his travel card in a sister Local Union, he shall continue to pay all his regular dues and assessments to the Local Union in which he holds membership,

and shall retain all rights and privileges of membership in his home Local Union."). Although the traveler may attend meetings at the sister local, he is entitled to vote only at his "home" local. Id. s 229(h) ("Such member shall not be entitled to voice or vote in the Local Union in which his travel card is deposited, but shall enjoy the privilege of attending the meetings of the Local Union."). Plaintiffs here were members of Local 76 who only traveled to Local 305's geographic jurisdiction to obtain work.

Different procedures govern the process by which a member of one local union may "transfer" to a different local. Id. s 230. If a member of a local utilizes this process, that member loses membership rights in the first local and becomes a member of the second. See id. s 230(k), (l). Plaintiffs in this case

did not utilize this "transfer" procedure, and in no way sought more than "travelers' " rights in Local 305. Plaintiffs stress that they were qualified for membership in Local 305 and were the functional equivalent of members in Local 305. This is immaterial where, as here, plaintiffs did not seek to become full members. We conclude therefore that plaintiffs were not members of Local 305 as defined by the United Association's constitution and the LMRDA. The district court erred in holding that it had jurisdiction under the claims brought against Local 305 and Terrence Quinn under the LMRDA, and on remand it should dismiss those claims.

B. Borrowing Statutes of Limitations

Counts One and Four were dismissed as against United Association and Local 305

on statute of limitations grounds. Plaintiffs argue that we should reinstate Counts One and Four, which were not LMRDA claims, because an improper limitations period was applied by the district court. Count One alleged a breach of the duty of fair representation by discriminating against plaintiffs in job referrals in retaliation for their internal union activity. Count Four alleged a violation of section 301 by breach of obligations contained in the United Association constitution and the locals' bylaws. Neither count named employer defendants. After a number of rulings by different magistrate judges and the Supreme Court's issuance of a significant decision on the issue, Reed v. United Transportation Union, 488 U.S. 319, 109 S.Ct. 621, 102 L.Ed.2d 665 (1989) (borrowing state limitations period in LMRDA suit), the

district court, based on the Supreme Court's opinion in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), borrowed the federal six month limitations period in LMRA section 10(b), 29 U.S.C. s 160(b) (section 10(b)), and dismissed these counts as against United Association and Local 305 as time barred. Its rationale was that the claims would directly affect the labor management relationship, and that federal labor policy militated against allowing such claims to fester unnecessarily. Plaintiffs claim that Reed should have governed and argue that the district court should have applied state limitations periods. We agree as to Count Four's section 301 claim but not as to Count One's duty of fair representation claim. Patrick Quinn argues that section 10(b)'s

six month limitations period should have governed Count Three's LMRDA claims. We disagree.

Where, as here, the federal statute under which a plaintiff brings an action does not provide a specific limitations period, federal courts must determine the appropriate limitations period according to federal law. See Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 701, 86 S.Ct. 1107, 1111, 16 L.Ed.2d 192 (1966) (federal law governs timeliness issue in section 301 suits). This normally entails borrowing the most closely analogous state statute of limitations. See, e.g., DelCostello, 462 U.S. at 158, 103 S.Ct. at 2287. However, as has become increasingly apparent in the last several years, see Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, --- U.S. ----, 111 S.Ct. 2773, 115 L.Ed.2d

321 (1991) (borrowing federal securities limitation to create uniformity); Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) (borrowing antitrust limitation in RICO case); DelCostello, 462 U.S. at 151, 103 S.Ct. at 2283 (borrowing federal limitation in labor case), state limitations periods do not necessarily complement federal statutes and borrowing them sometimes proves unwise. Cf. Communications Workers of America v. Western Electric Co., 860 F.2d 1137, 1139 (1st Cir.1988) ("[T]he glance in the direction of the state-law cupboard should not be an automatic or reflexive one."). Accordingly, we borrow federal rather than state limitations periods where (1) a federal rule of limitations clearly provides a closer analogy than state alternatives, and (2)

the federal policies at stake and the practicalities of the litigation render the federal limitation "a significantly more appropriate vehicle for interstitial lawmaking." DelCostello, 462 U.S. at 172, 103 S.Ct. at 2294. These circumstances are "closely circumscribed." Reed, 488 U.S. at 324, 109 S.Ct. at 625.

The problems in choosing the proper statute to borrow are compounded in the labor area, where even section 301 encompasses many varieties of actions. Compare Auto Workers, 383 U.S. at 705-08, 86 S.Ct. at 1113-15 (contract type action), with DelCostello, 462 U.S. at 163-72, 103 S.Ct. at 2290-94 (hybrid section 301/fair representation suit). Because the Supreme Court has rejected the argument that uniformity among borrowing limitations is needed among all labor cases, see Auto Workers, 383 U.S. at

702-03, 86 S.Ct. at 1111-12 ("Lack of uniformity [among statutes of limitations in section 301 suits] is ... unlikely to frustrate in any important way the achievement of any significant goal of labor policy.... That Congress did not provide a uniform limitations provision for s 301 suits is not an argument for judicially creating one."), we analyze each labor case on its facts before choosing which limitations period to borrow.

A number of Supreme Court decisions provide guidance, and we address them in turn. In Auto Workers, 383 U.S. at 696, 86 S.Ct. at 1107, the Court considered an action brought by a union against an employer to recover vacation pay that allegedly was due to discharged employees under the terms of a collective bargaining agreement. Because an action

for vacation pay is basically an action for damages based on an employer's alleged breach of a collective bargaining agreement, which closely resembles a state law action for contractual breach, id. at 705 n. 7, 86 S.Ct. at 1113 n. 7, the Court applied the state's statute of limitations for contracts not in writing, id. at 707, 86 S.Ct. at 1114. The Court made clear, however, that its decision did not necessarily mandate a similar result in other section 301 actions, id. at 705 n. 7, 86 S.Ct. at 1113 n. 7 ("Whether other s 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question.") (citations omitted), and left open the door for the borrowing of federal limitations periods in labor cases.

In DelCostello, 462 U.S. at 151, 103 S.Ct. at 2283, the Supreme Court addressed what statute of limitations applies in a hybrid section 301/fair representation suit. In a hybrid section 301/fair representation suit, the union member sues both an employer and a union alleging the employer's breach of a collective bargaining agreement and the union's breach of its duty of fair representation by mishandling the ensuing grievance or arbitration proceedings. As a formal matter, the suit comprises two causes of action. See, e.g., id. at 164, 103 S.Ct. at 2290. Section 301 provides the basis for the claim against the employer, and the duty of fair representation claim is implied under the National Labor Relations Act (NLRA). Id. at 164 & n. 14, 103 S.Ct. at 2290 & n. 14.

The Court concluded that hybrid claims have "no close analogy in ordinary state law." Id. at 165, 103 S.Ct. at 2291. It stressed that although brought separately against the union and the employer, " 'the two claims are inextricably interdependent....' The employee may ... sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both." Id. at 164-65, 103 S.Ct. at 2291.

Having determined that the hybrid suit at issue had no counterpart in state law, the Court turned its attention to whether the state limitations periods suggested by the parties were appropriate. It declined to borrow the state limitations period either for vacating arbitration awards or for legal malpractice. The ninety day period for

challenging an arbitration award would have failed to provide an aggrieved employee an adequate chance to vindicate his rights under section 301 and the fair representation doctrine. On the other hand, borrowing the longer state limitations period for legal malpractice would have frustrated the federal policy in favor of resolving labor disputes expeditiously.

As a result, the DelCostello Court held that the six month limitations period found in LMRA section 10(b), 29 U.S.C. s 160(b), should apply. The Court applied the section 10(b) period because in enacting it Congress had balanced the " 'national interests in stable bargaining relationships and finality of private settlements.' " Id. at 171, 103 S.Ct. at 2294 (citation omitted). In the Court's view, the state limitations periods were

"unsatisfactory vehicles for the enforcement of federal law." Id. at 161, 103 S.Ct. at 2289.

The Supreme Court again addressed the borrowing issue in Reed. In Reed, a union local refused to reimburse its secretary-treasurer for time lost while carrying out union duties. Reed, 488 U.S. at 321-22, 109 S.Ct. at 624. The secretary-treasurer, who had been a vocal critic of the local's president, brought an action against his union and its officers alleging interference with his LMRDA protected right to free speech on union matters. Id. The Court reasserted the general rule that when Congress fails to provide a limitations period for a federal cause of action, courts typically should borrow the most analogous state limitations period and emphasized that in labor law as elsewhere the exception to

this rule is narrow. Id. at 323-24, 109 S.Ct. at 625. Accordingly, the Court held that the longer limitations period of state personal injury statutes applied to LMRDA section 101(a)(2), 29 U.S.C. s 411(a)(2), claims. Id. at 334, 109 S.Ct. at 630.

The Court rejected the argument that the section 10(b) six month limitations period should apply to LMRDA claims because dissension within a union affects the union's activities and effectiveness in the collective bargaining arena. Id. at 330-31, 109 S.Ct. at 629. Although the Court acknowledged that intra-union disputes might have a ripple effect on the collective bargaining relationship, id., it concluded that such effects were purely tangential, and that the federal interests in collective bargaining and in the resolution of disputes under

collective bargaining agreements were insufficiently implicated to invoke the section 10(b) limitations period, id. at 331, 109 S.Ct. at 629.

Internal union disputes, if allowed to fester, may erode the confidence of union members in their leaders and possibly cause disaffection with the union, thus weakening the union and its ability to bargain for its members. The Supreme Court concluded, however, that these concerns "establish no more than that s 101(a)(2) actions may sometimes have 'some impact on economic relations between union and employer and on labor peace.' " Id. at 331, 109 S.Ct. at 629 (citation omitted). As the Court stated:

> This is substantially less immediate and less significant an impact on bargaining and private dispute settlement than that which led us to apply the s 10(b) statute to hybrid s 301/fair representation claims,

> which directly challenge both the employer's adherence to the collective-bargaining agreement and the union's representation of the employee in grievance-and-arbitration procedures.

Id.

This Court has had occasion in a number of labor cases to decide whether borrowing the section 10(b) limitation is appropriate. Our cases stress that DelCostello "should be narrowly construed." Rodonich, 817 F.2d at 976. Thus, in Rodonich, we held that courts should borrow state limitations periods where LMRDA claims "are asserted only against the union and concern disruption of internal union democracy." Id. at 977. However, our opinions also are clear in instructing district courts not to limit DelCostello to its facts. See, e.g., Eatz v. DME Unit of Local Union Number 3, 794 F.2d 29, 33 (2d Cir.1986). We

therefore have borrowed the section 10(b) limitations period where claims have directly implicated the collective bargaining relationship, even in the non-hybrid context. For example, we have specifically applied DelCostello to duty of fair representation claims. See Gvozdenovic v. United Air Lines, 933 F.2d 1100, 1106 (2d Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 305, --- L.Ed.2d ---- (1991); Haerum v. Air Line Pilots Ass'n, 892 F.2d 216, 219 (2d Cir.1989); Eatz, 794 F.2d at 33.

We conclude that state limitations periods govern Counts Three and Four and that Count One should be governed by the six month section 10(b) limitations period.

Count One alleges that United Association breached its duty of fair representation. Under DelCostello, such

claims are subject to the section 10(b) six month limitations period. See DelCostello, 462 U.S. at 151, 103 S.Ct. at 2283; see also Gvozdenovic, 933 F.2d at 1106 (applying six month limitations period to duty of fair representation claim); Haerum, 892 F.2d at 219 (same); Eatz, 794 F.2d at 33 (same). Because the duty of fair representation involves the union's conduct of its duties vis-a-vis the employer, the concerns expressed in DelCostello are directly implicated. The district court therefore appropriately applied the section 10(b) limitations period. For reasons set forth below in our discussion of plaintiffs Phelan's and Cotton's claims against Patrick Quinn, see infra at D.2, we conclude that no actionable event occurred within six months prior to the December 3, 1985 filing of the complaint in this action.

The district court thus properly dismissed this count.

Reed makes clear that the district court properly applied the three year limitations period applicable to personal injury claims to Count Three, the alleged conspiracy to deprive plaintiffs of their LMRDA rights. See Reed, 488 U.S. at 334, 109 S.Ct. at 630. The LMRDA interest in allowing plaintiffs to evaluate their claims is directly implicated. See id. at 326- 27, 109 S.Ct. at 627. As in Reed, the collective bargaining process is implicated only indirectly by a claim such as this, and the policies that underlie section 10(b) are not sufficiently invoked to require that we depart from the normal course of borrowing state limitations periods. We reject defendants' argument that plaintiffs' LMRDA claim is merely a repackaged hybrid claim that properly is

governed by section 10(b)'s six month limitations period. Thus, the district court properly applied the three year personal injury limitations period to Count Three.

We similarly conclude that Count Four, based on the alleged breach of United Association's constitution, should be governed by an appropriate state limitations period. We are not convinced that this count has no counterpart in state law. As in Auto Workers, 383 U.S. at 705-08, 86 S.Ct. at 1113-15, the claim readily may be analogized to a claim for breach of contract. See Tobin v. Barry, 678 F.Supp. 1018, 1022 (S.D.N.Y.1987) (citing O'Hare v. General Marine Transport Co., 740 F.2d 160, 167 (2d Cir.1984), cert. denied, 469 U.S. 1212, 105 S.Ct. 1181, 84 L.Ed.2d 329 (1985)). Nor would the normal course of borrowing

a state limitations period frustrate federal law. This case does not involve the formation or ratification of a collective bargaining agreement as was the case in Legutko v. Local 816, Int'l Brotherhood of Teamsters, 853 F.2d 1046, 1050-52 (2d Cir.1988). Resolution of claims concerning breach of a union constitution that do not relate to formation of a collective bargaining agreement should not have a direct and immediate impact on union-management relations. See Reed, 488 U.S. at 331, 109 S.Ct. at 629. The district court therefore erred by adopting the section 10(b) limitations period. The district court on remand should analyze the most closely analogous Connecticut state law action and apply its limitations period to Count Four.

C. Claims Against United Association

The district court dismissed on summary judgment plaintiffs' claims as against United Association. Plaintiffs argue that they had valid claims on Counts Three and Four, their only claims which we do not conclude to be time-barred. We reject plaintiffs' argument.

Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c). " '[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.... Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the

entry of summary judgment.' " Republic Nat'l Bank of New York v. Eastern Airlines, 815 F.2d 232, 238 (2d Cir.1987) (citation omitted). "[W]hen a nonmoving party 'has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof,' " the district court should grant summary judgment. Burke v. Bevona, 931 F.2d 998, 1001 (2d Cir.1991) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

An international union has no independent duty to intervene in the affairs of its local chapters, even where the international has knowledge of the local's unlawful acts. See Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212, 217-18, 100 S.Ct. 410, 414, 62 L.Ed.2d 394 (1979). Common law agency

principles govern an international union's liability for actions of its local chapters or their officers. See Rodonich, 817 F.2d at 972-73. The international is liable if it ratified the illegal acts of the local. Id. at 973. Ratification occurs " 'when the principal, having knowledge of the material facts involved in a transaction, evidences an intention to ratify it.' " Id. (citations omitted). These principles apply both to violations of contracts between labor organizations under section 301 of the LMRA, 29 U.S.C. s 185, and to union democracy claims under the LMRDA, 29 U.S.C. s 411 et seq. Id. at 972-73.

Plaintiffs point out that they complained about the scheme to suppress dissent. However, when plaintiffs complained to the United Association

General President, he assured them that he would see to it that their travel cards would be accepted. Plaintiffs also stress that a United Association representative attended meetings of the Connecticut local chapters' business managers at which plaintiffs' complaints were mentioned. This provided no evidence of ratification or participation. Plaintiffs also stress that United Association offered legal assistance in a previous NLRB proceeding. However, as an affidavit of United Association's Assistant General President explained, "[t]he UA ... authorizes its counsel to render legal services in matters in which the UA is not itself a party.... Such services can take the form of a 'friend of the court,' or amicus, brief or of other advice or support in matters or on issues in which our counsel have some special experience or expertise

... so long as the matter is one in which the UA shares a common concern." This affidavit explained that legal assistance was offered to challenge an agency theory with which United Association disagreed. The offer or limited provision of legal aid does not alone suffice to show a triable issue as to whether an international union either had full knowledge of and ratified the locals' actions or had itself participated in a system of discriminatory referrals. Cf. Sine v. Local No. 992, International Brotherhood of Teamsters, 730 F.2d 964, 966 (4th Cir.1984) (lawyer's limited assistance alone was insufficient to show an agency relationship on which liability could be based). There was no evidence that United Association participated in, ratified or encouraged the scheme to suppress dissent. We need not determine

whether provision of legal services in other circumstances could serve as a basis for liability. Plaintiffs, in opposing United Association's summary judgment motion, directed the district court to no evidence from which the United Association could have been held liable either for injuring them by breaching or ratifying a breach of the United Association's constitution or by participating in or ratifying the scheme to suppress dissent. Summary judgment was proper.

D. Claims Against Patrick Quinn

1. Fitzgerald

Patrick Quinn and Fitzgerald each make arguments concerning treatment below of Fitzgerald's LMRDA Bill of Rights claim that proceeded to trial. The jury awarded Fitzgerald $4,534.22 in back pay

and $50,000 in punitive damages against Patrick Quinn. We discuss only those arguments that deserve attention or affect our decision.

a. Jury Instructions

Patrick Quinn asks us to reverse the judgment against him based on error in the jury instructions. We review a claim of error in a jury charge to determine "whether the entire charge, viewed in light of all of the evidence, would tend to confuse or mislead the jury as to the principles of law that apply to the facts." National R.R. Passenger Corp. v. One 25,900 Square Foot Parcel of Land, 766 F.2d 685, 688 (2d Cir.1985) (citation omitted). "[W]e will reverse the judgment of a trial court ... because of an error in the jury instructions only if, based on a review of the record as a whole, we are persuaded that the error

was prejudicial." Id. (citation omitted); see Fed.R.Civ.P. 61.

Patrick Quinn directs us to the seventh interrogatory to the jury, which asked: "Has the plaintiff, Donald Fitzgerald, met his burden of proving by clear and convincing evidence that defendant Patrick Quinn engaged in a scheme to suppress dissent within the union?" He asserts in essence that this question improperly relieved Fitzgerald of the need to prove during the liability phase of the proceedings that Patrick Quinn injured Fitzgerald.

As noted above, section 102 of the LMRDA affords a remedy to any person whose rights secured by Title I have been infringed. See 29 U.S.C. s 412; Johnson v. Kay, 860 F.2d 529, 536 (2d Cir.1988). Among the rights alleged to have been infringed in this case are rights

guaranteed by sections 101(a)(1) and (2), which secure to union members, inter alia, the right to nominate candidates and to express any views concerning union activities and candidates for union office. See 29 U.S.C. s 411(a)(1), (2). Union members may maintain an action under section 102 by proving a general scheme to suppress dissent within the union. See Schonfeld v. Penza, 477 F.2d 899, 904 (2d Cir.1973). Although a section 102 plaintiff may prove his or her case by demonstrating economic injury resulting from retaliation for his or her exercise of section 101 rights, such proof is not necessary in the liability phase of a bifurcated trial.

The jury instructions in this case fairly conveyed to the jury the nature of Fitzgerald's claim. The court instructed the jury that "Fitzgerald [and the other

plaintiffs] assert that ... Patrick Quinn[ ] infringed their rights as union members by engaging in a scheme to suppress dissent" and that "plaintiffs claim that the refusal to allow them to register for work ... violated their rights under Title I." (emphasis added). The court did not err by waiting until the damages phase of the trial specifically to ask the jury whether Fitzgerald had proven by clear and convincing evidence that he had lost wages as a result of Patrick Quinn's involvement in the scheme to suppress dissent.

b. Failure to Reduce the Back Pay Award

Patrick Quinn argues that Fitzgerald's back pay award against him should have been reduced by the amount of back pay awarded to Fitzgerald in the NLRB proceedings as a result of the February 27, 1985 hiring hall event. We

agree.

A plaintiff may not recover twice for the same injury. See, e.g., Ostano Commerzanstalt v. Telewide Systems, 880 F.2d 642, 649 (2d Cir.1989) (double recovery puts plaintiffs in better position than had they not been injured); cf. Louis P. Singer v. Olympia Brewing Co., 878 F.2d 596, 600 (2d Cir.1989) (adopting one satisfaction rule to govern settlements in 10b- 5 securities cases), cert. denied, 493 U.S. 1024, 110 S.Ct. 729, 107 L.Ed.2d 748 (1990). When a plaintiff receives a payment from one source for an injury, defendants are entitled to a credit of that amount against any judgment obtained by the plaintiff as long as both payments represent common damages. Cf. Singer, 878 F.2d at 600 (similar holding regarding settlements).

Fitzgerald argues that there was no double recovery because his proof of damages in the NLRB proceeding for which he received back pay damages from the February 27, 1985 event differed from the proof in the trial. He directs us to the January 18, 1985 layoff, from which he argues additional back pay could be awarded. However, he directs us to no evidence from which a jury reasonably could have concluded that the layoff resulted from the scheme to suppress dissent and Patrick Quinn's animosity toward him.

Fitzgerald presented clear and convincing evidence that Patrick Quinn injured him on February 27, 1985 through the scheme to suppress dissent, and that Fitzgerald suffered lost wages as a result. Fitzgerald has not directed us to clear and convincing evidence of damages

stemming from any other event. Nor has he directed us to any evidence that he did not fully recover in the NLRB proceeding for back pay damages between February 27, 1985 and June 3, 1985, the date on which the jury concluded damages ceased. Accordingly, the back pay award against Patrick Quinn should be set off in full to prevent a double recovery.

c. Punitive Damages and Remittitur Practice

After a seven day damages trial, the jury awarded plaintiff Fitzgerald $50,000 in punitive damages against Patrick Quinn. The magistrate judge reduced the punitive damages award to $25,000, calling the $50,000 award "excessive." The magistrate judge did not offer Fitzgerald a new trial instead of a diminished award. Both Fitzgerald and Patrick Quinn

argue that the procedure below was improper. We agree.

If a district court determines that a verdict is excessive, it may order a complete new trial or a new trial limited to damages. See 11 C. Wright & A. Miller, Federal Practice and Procedure s 2815, at 99 (1973 & Supp.1992). Under the practice of remittitur--"[T]he procedural process by which a verdict of the jury is diminished by subtraction." Black's Law Dictionary 1164 (5th ed. 1979)--the court also may condition a denial of a motion for a new trial on the filing by plaintiff of a remittitur in a stated amount. This provides plaintiff with the choice of either submitting to a new trial or of agreeing to an amount of damages that the court considers justified. However, the court should not decrease damages based on its belief that

they are excessive without affording the option of a new trial. See Kennon v. Gilmer, 131 U.S. 22, 29, 9 S.Ct. 696, 699, 33 L.Ed. 110 (1889) ("[N]o court of law ... is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury."); Farber v. Massillon Bd. of Educ., 917 F.2d 1391, 1396 (6th Cir.1990), cert. denied, --- U.S. ----, 111 S.Ct. 2851, 115 L.Ed.2d 1019 (1991); O'Gilvie v. International Playtex, 821 F.2d 1438, 1447-48 (10th Cir.1987), cert. denied, 486 U.S. 1032, 108 S.Ct. 2014, 100 L.Ed.2d 601 (1988); Kline v. Wolf, 702 F.2d 400, 405 (2d Cir.1983); Staplin v. Maritime Overseas Corp., 519 F.2d 969, 972 (2d Cir.1975). Accordingly, we conclude that the magistrate judge erred in reducing the

jury's award of punitive damages without giving plaintiffs the option of a new trial.

Patrick Quinn argues additionally that the jury was not entitled to conclude that he acted maliciously toward Fitzgerald. This argument is meritless and does not warrant discussion. The district court on remand should employ proper remittitur procedures.

2. Phelan and Cotton

Plaintiffs Phelan and Cotton released Local 76 and its agents for any event that occurred prior to June 3, 1985. They claim, however, that their LMRDA claims against Patrick Quinn should be reinstated because actionable events, in which they concede Patrick Quinn did not directly participate, occurred subsequent to that date. We disagree.

Plaintiffs claim that referrals were made on June 10, 1985 and that "there was a basis for a reasonable jury to conclude it would have been two of the plaintiffs who went to Millstone instead of the two who actually went" if defendants had not manipulated the hiring hall. The district court rejected the argument that this referral constituted an actionable event. The district court explained that plaintiffs had been notified in writing by the United Association's General President in April 1985 that they could register for work at Local 305 but had failed to do so. Because plaintiffs had not availed themselves of this opportunity at the time of the June 10 referrals, the district court concluded that referrals occurring between the date of the letter and their attempt to register on June 25 did not constitute

actionable events. Its rationale was that if plaintiffs had in fact attempted to register they might have received the referrals. On the facts of this case, we agree with the district court. Accordingly, we need not decide whether a "continuing wrong" theory should govern the date on which limitations periods begin to run in LMRDA cases involving hiring halls. See Lewis v. Local Union No. 100 of Laborers' Int'l Union, 750 F.2d 1368, 1378-79 (7th Cir.1984).

Plaintiffs also claimed at summary judgment that they were given the wrong out-of-work book--that is, a book out of which workers were not regularly referred to Millstone--to sign when they attempted to register with Local 305 on June 25, 1985. They argued that another book existed, out of which others first were referred. Because plaintiffs did not, at

the time of the summary judgment motion, rebut defendants' assertion that no referrals took place after plaintiffs allegedly were given the wrong book, the district judge concluded that the event was not actionable. On appeal, plaintiffs make no meritorious argument as to why we should reverse this ruling.

We reject Patrick Quinn's argument that the magistrate judge abused his discretion in denying Rule 11 sanctions because plaintiffs supported their claims on the timeliness issue with hearsay evidence at summary judgment. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990) (applying abuse of discretion standard in reviewing Rule 11 sanctions).

CONCLUSION

We have considered the parties' other

arguments, and they do not affect our decision. The judgment of the district court is affirmed in part, reversed in part and remanded for further proceedings not inconsistent with this opinion. The parties shall bear their own costs.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of November [sic][3] one thousand nine hundred and ninety-two.

Present:

HON. THOMAS J. MESKILL, CH.J.
HON. JON O. NEWMAN, Circuit Judge,
HON. RICHARD J. ARCARA,
District Judge.

CIRCUIT JUDGES,

PHELAN, ET.AL,
Plaintiffs-Appellees-Cross-
Appellants

-v.- Docket No. 91-9145L

QUINN, ET. AL
Defendants-Appellants-Cross-
Appellees.

A petition for rehearing having been filed herein by

Appellees-Cross-Appellants
PHELAN, ET.AL

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[3] This is an error by the court. The notice of denial of rehearing was sent out in October.

[Order on Petition for Rehearing Continued]

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B.Goldsmith,
Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

SHANE P. PHELAN, ET AL	:	CIV. NO.H-85-1035
Plaintiffs	:	
V.	:	
TERRENCE QUINN, ET AL	:	
Defendants	:	

RULING ON DEFENDANT LOCAL 305 AND TERRENCE QUINN'S MOTION TO DISMISS

Defendants Local 305 and Terrence Quinn have moved for dismissal of the plaintiffs' Substituted Complaint on the grounds that (1) the court lacks subject matter jurisdiction over the plaintiffs' claims because they were not members of Local 305 and therefore have no rights under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 401, et seq (hereinafter "LMRDA"); and (2) the Local's failure to refer the plaintiffs for employment does not constitute "discipline" within the meaning of the LMRDA. For the following reasons, the

defendants' motion is denied.

FACTUAL BACKGROUND

The present motion to dismiss attacks the plaintiffs' Two Count Substituted Complaint filed May 30, 1990.[1] The plaintiffs' First Count alleges that Local 305 and its business manager, Terrence Quinn, acting in concert with Patrick Quinn, business manager of Local 76 (of which the plaintiffs' were members), deprived the plaintiffs of their rights as secured by the LMRDA.[2] Specifically, the

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[1] See Docket Number 306.

[2] Section 101(a) (1) of the LMRDA, 29 U./S.C. Section 411 (a) (1), provides, in pertinent part, that "[e]very member of a labor organization shall have equal rights and privileges within such organization to nominate candidates [and] to vote in elections or referendums of the labor organization...."

Section 101(a) (2) of the LMRDA, 29 U.S.C. Section 411 (a) (2) provides, in pertinent part, that "[e]very member of

(continued...)

plaintiffs allege that 305 and Terrence Quinn refused to refer the plaintiffs for employment because they opposed defendant Patrick Quinn (the brother of Terrence Quinn) in certain union activities and elections that transpired at Local 76.[3]

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[2](...continued)
any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting,..."

[3] The plaintiffs' second count alleges that Local 305, Terrence and Patrick Quinn conspired with certain collective bargaining representatives of construction contractors within the jurisdiction of Locals 76 and 305 to deprive the plaintiffs of employment in violation of section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185 (a). Although the present motion to dismiss (docket no. 359) refers to the plaintiffs' LMRA claim as being subject to dismissal, the defendants' motion and memorandum in support thereof address only the plaintiffs' LMRDA claim.
(continued...)

Local 305 and Terrence Quinn now move for dismissal of the plaintiff's Substituted Complaint on the grounds that (1) because the plaintiffs were not members of Local 305 at the time they allegedly suffered deprivations of their LMRDA rights, the court lacks subject matter jurisdiction as to the LMRDA claims; and (2) that the refusal of Local 305 and Terrence Quinn to refer the plaintiffs for employment is not "discipline" within the meaning of LMRDA Section 101(a) (5), 29 U.S.C. Section 411 (a) (5). Each of the defendants' claims is addressed herein.

DISCUSSION

A. Membership in Local 305

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[3](...continued)
Consequently, this ruling is restricted in scope to the first count of the plaintiffs' substituted complaint.

The defendants assert as their first ground for dismissal that the plaintiffs are unable to state a claim under LMRDA because they were never members of Local 305. The defendants do not dispute that the plaintiffs were members of Local 76.[4]

29 U.S.C. Section 412 confers jurisdiction upon the district courts to hear claims brought by union members against their labor organizations seeking redress for infringement of any of the rights secured by LMRDA.[5] The act defines "labor organization" broadly to include (in pertinent part)

> any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged

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[4] See defendants' memorandum in support of their motion (docket no. 360), at pp. 4-5.

[5] See footnote 2, supra, and accompanying text.

> in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning ... wages, rates of pay, hours, or other terms or conditions of employment, ...

29 U.S.C. Section 402 (i). In addition, 29 U.S.C. Section 402 (o) defines "member", as used in reference to a labor organization, to include "any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership" of that organization.

Courts have interpreted the definition of member broadly to include not only recognized members of a labor organization, but also "any person who has fulfilled the requirements of membership, i.e., those who are members in substance despite the fact that the union officials

have not performed the ministerial acts necessary to give formal recognition to a person's status as a member." Basilicato v. International Alliance of Theatrical Stage Employees, 479 F. Supp. 1232, 1242 (D. Conn. 1979), aff'd, 628 F.2d 1344 (2d Cir. 1980); Brennan v. Local 357, Intern. Broth. of Teamsters, 709 F.2d 611, 614 (9th Cir. 1983). Further, it has been held that a union member may transfer his membership between locals if provisions for such transfer of membership are provided in the union constitution. Parish v. Legion, 450 F.2d 821, 826 (9th Cir. 1971).

Mindful that it must assume that the allegations in the plaintiffs' complaint are true for the purpose of ruling on the defendants' motion to dismiss, Dwyer v. Regan, 777 F.2d 825 (2d Cir. 1985), the court does not agree that the plaintiffs

are unable to state a cause of action under LMRDA against Local 305 and its business manager, Terrence Quinn. The plaintiffs allege in their Substituted Complaint (paragraph 10) that the union constitution and Local 305 by-laws allow members of other union locals to be referred for employment within the jurisdiction of Local 305. The constitution and by-laws, not submitted to the court for consideration in deciding this motion, must be interpreted to resolve the question of whether the plaintiffs were "members" within the meaning of LMRDA and thus were entitled to the rights afforded under that act. Without presentation by the defendants of evidence which refutes the plaintiffs' allegation as to transfer of membership, the court must construe the allegations of the complaint in favor of the plaintiffs

and deny the defendants' motion. See Scheur v. Rhodes, 416 U.S. 232, 236 (1974).

The authorities relied upon by Local 305 and Terrence Quinn are distinguishable from the present case. Brennan (cited supra) involved reinstatement of a member who was suspended for failure to pay his dues and who did not comply with the local's by-laws relating to membership and reinstatement. Id. at 614, 615. In this case, the plaintiffs were active members of the international and Local 76 who sought to transfer to Local 305 for employment referral within its jurisdiction. The present defendants, as distinguished from those in Brennan do not contend that the plaintiffs were ineligible for membership in accordance with a specific union constitution or by-law provision. Brennan is inapposite.

Similarly, the defendants' reliance upon Gates v. Dalton, 67 F.R.D. 621 (E.D.N.Y. 1975), is misplaced. In Gates, the court, ruling on a motion to certify a class, held that certain employees who were not members of the defendant labor organization did not have standing to sue under LMRDA challenging a dues increase because those employees paid no union dues. Id. at 629. In this case, the defendants do not argue that the plaintiffs were not required to pay dues to Local 305 while employed at positions obtained through the Local. Further, plaintiffs allege that the union constitution and Local by-laws provide for transfer of membership between locals. Gates is not analogous to this case.

Finally, the defendants argue that LMRDA does not provide a cause of action

for conspiracy, and relies, in part, upon a previous ruling in this case issued by the Honorable Emmett Clarie.[6] While they correctly repeat Judge Clarie's broad statement as to conspiracy claims in general, the defendants completely ignore the Judge's holding as to the present case; because the defendants have failed to acknowledge Judge Clarie's holding as to the significance of the plaintiffs' conspiracy allegations, it bears repeating:

> Where conspiracy allegations can be fairly read as a claim of concerted action to cause injury, and those actions taken suffice, in and of themselves, to constitute a cause of action under the LMRDA, then the inclusion of conspiracy allegations, though surplusage, do not destroy the claim. (citation omitted)...

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[6] See Ruling on Plaintiffs' Objections to Magistrates' Recommended Rulings and on Cross-Motions for Summary Judgment, docket number 304.

> The denial of referrals by Local 305 and Terrence Quinn...could reasonably be inferred to have been caused as a result or a part of efforts to deprive them of rights protected by the LMRDA, which Patrick Quinn may have been a part of.

Ruling on Summary Judgement, slip. op. at 26. Construing the allegations of the complaint in favor of the plaintiffs, the court finds that the plaintiffs have stated a claim under LMRDA for infringement of protected rights.

B. Plaintiff's Wrongful Discipline Claims

The defendants' second ground for dismissal of the Substituted Complaint is premised upon the assumption that the plaintiffs' LMRDA claim alleges that they were disciplined for engaging in protected union activities, and that the discipline took the form of refusals on the part of the defendants to refer the plaintiffs for employment. Although the plaintiffs'

original complaint stated a wrongful discipline claim, Judge Clarie's ruling on cross motions for summary judgment awarded summary judgment to all defendants on this claim. See Ruling on Summary Judgment, slip. op. at 23-25. There is no pending wrongful discipline claim in this case.

Unfortunately, the defendants have again misread Judge Clarie's Ruling. Although he dismissed the plaintiffs' prior claim of wrongful discipline, Judge Clarie held that the plaintiffs sufficiently state a cause of action for infringement of LMRDA rights, and that the manner in which the plaintiffs' suffered such infringement, at least in part, may be in the form of the defendants' failure to refer the plaintiffs for employment through the Local 305 hiring hall. Ruling on Summary Judgment, slip op. at 26. The defendants motion to dismiss addresses a

claim that has already been disposed of by grant of summary judgment, and therefore is denied.

CONCLUSION

For the foregoing reasons, the defendants motion to dismiss as to Local 305 and Terrence Quinn is denied.

Dated at Hartford, Connecticut this 7th day of November, 1990.

F. Owen Eagan
United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

SHANE P. PHELAN, ET AL	:	CIV. NO.H-85-1035
Plaintiffs	:	(TEC)
V.	:	
TERRENCE QUINN, ET AL	:	
Defendants	:	

RULING ON DEFENDANTS' POST-TRIAL MOTIONS AND MOTION FOR SANCTIONS

At the trial of this action, the plaintiffs asserted claims that the defendants interfered with their exercise of free speech and assembly rights in violation of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 401, et seq. After a bifurcated jury trial, the plaintiffs prevailed on liability and were awarded compensatory and punitive damages. The defendants have filed, pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, timely motions for judgment notwithstanding the verdict and a new trial. In addition, defendant Patrick Quinn has filed a motion

for sanctions arising out of the dismissal of several of the plaintiffs' claims prior to trial.

I. FACTUAL BACKGROUNDS

The plaintiffs commenced this action on December 3, 1985, by filing a multi-count complaint alleging federal and state law claims against the present defendants, Terrence Quinn, Patrick Quinn and Local 305 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("Local 305"). The plaintiffs' original complaint also purported to state claims against the Mechanical Contractors' Association of Connecticut, Inc., the Eastern Connecticut Mechanical Contractors' Association, Inc. and Stone & Webster Engineering Corporation, but the claims against these entities were dismissed by grant of

summary judgment.[1] Also disposed of by grant of summary judgment were all but one of the plaintiffs' claims against the remaining defendants; the only claims presented at trial were plaintiffs' Phelan, Cotton and Fitzgerald's allegations that Terrence Quinn and Local 305 infringed upon their LMRDA rights, and plaintiff Fitzgerald's claim that Patrick Quinn infringed upon his LMRDA rights. During the course of the trial, the plaintiffs filed an amended complaint that properly stated these remaining claims.[2]

After a seven-day trial on liability, the jury returned a special verdict in favor of the plaintiffs, answering in the

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[1] See Ruling on Plaintiffs' Objections to Magistrates' Recommended Rulings and on Cross-Motions for Summary Judgment, filed May 17, 1990 (docket no. 304).

[2] See Amended Complaint filed November 13, 1990 (docket no. 372).

affirmative special interrogatories which asked whether each plaintiff proved, by clear and convincing evidence, his claims that each defendant violated his LMRDA rights by engaging in a scheme to suppress dissent within the union.[3] Subsequently, a seven-day trial was held on damages, and the jury again found in favor of the plaintiffs, awarding a total of $502,638.85 in compensatory and punitive damages.[4] The court then held a hearing on the issue of reduction of the jury award, primarily to determine whether a prior NLRB award paid by Local 305 to the plaintiffs should be deducted from the jury's compensatory damages awards and whether the punitive damages awards were

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[3] See Special Interrogatories, docket no. 385.

[4] See Special Interrogatories, docket no. 415.

excessive. The court deducted the NLRB award from the jury's compensatory damages award against Local 305, reduced the punitive damages awards against Terrence and Patrick Quinn, and entered final judgment in the amount of $249,251.25.[5]

Addressed herein are defendant Patrick Quinn's motion for sanctions and motions for directed verdict, judgment n.o.v. and a new trial filed by each defendant.[6]

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[5] See Memorandum and Order, docket no. 425.

[6] Because the parties state the same grounds for their motions for directed verdict, judgment n.o.v. and new trial, the court does not distinguish between these motions while discussing the defendants' arguments.

II. DISCUSSION

A. Motion for Sanctions

Defendant Patrick Quinn has filed a motion for sanctions,[7] pursuant to Fed. R. Civ. P. 11, against plaintiffs Phelan and Cotton on the ground that Phelan and Cotton's claims against Patrick Quinn were without merit. At the hearing on this motion, the plaintiffs offered testimony from attorney Jonathan Gould, who represents Local 84 (formerly Local 76), the union local of which Patrick Quinn was business manager and the plaintiffs were members. Attorney Gould testified, and presented correspondence from counsel for Patrick Quinn which indicated, that the impetus for filing of the Rule 11 motion was Patrick Quinn's counsel's concern that failure to file the motion would hinder

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[7] See Motion for Rule 11 Sanctions filed June 6, 1990 (Docket No. 310).

his attempt to obtain reimbursement for his attorney's fees from Local 84.

Rule 11 of the Federal Rules of Civil Procedure imposes upon the court an objective test for determining the merits of the defendant's motion for sanctions. As established by the Second Circuit in Eastway Construction Corp. v. New York, 762 F.2d 243 (2d Cir. 1985), a violation of Rule 11 is triggered

> . . . when it appears that a pleading has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleadings is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

Id. at 254. Any doubts about the viability of a pleading must be resolved in favor of the signer. Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir.

1986), cert. denied, 480 U.S. 918 (1987). Where "it is clear that the action was destined to fail based on the facts and existing precedent, and where no reasonable argument could be advanced to change or extend the present law, Rule 11 requires a sanction." O'Malley v. New York City Transit Authority, 896 F.2d 704, 706 (2d Cir. 1990).

In this case, the defendant claims that plaintiffs Phelan and Cotton did not allege claims that were well grounded in fact and warranted by existing law. In support of his argument, the defendant notes that (1) Phelan and Cotton's claims under the Labor-Management Relations Act (LMRA) were dismissed for failure to state a claim upon which relief could be granted, and (2) Phelan and Cotton's LMRDA claims were dismissed by grant of summary

judgment. The plaintiffs' LMRA and LMRDA claims must be discussed separately.

1. LMRA Claims

The plaintiffs' original complaint purported to state a cause of action against Patrick Quinn for violation of the LMRA.[8] At the time of the filing of their complaint, existing law clearly prohibited the recovery of damages under the LMRA from individual union officers. See Atkinson v. Sinclair Refining Co., 370 U.S. 238, 245-248 (1962); Complete Auto Transit, Inc. V. Reis, 451 U.S. 401, 406-07 (1981). Plaintiffs' counsel could have

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[8] Section 301(b) of the LMRA, 29 U.S.C. Section 185(b), provides, in relevant part:

> Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member of his assets.

discovered this prohibition with a minimal amount of research. Of course, defendant's counsel could have done the same in the process of preparing his motion to dismiss, with little cost incurred in the process. The court finds that plaintiff's counsel brought an LMRA claim against Patrick Quinn which was clearly destined to fail, and orders counsel for Patrick Quinn to submit documentation in support of his claim for attorney's fees incurred in opposition to the plaintiffs' LMRA claim.

2. LMRDA Claims

Defendant Patrick Quinn also seeks sanctions for the plaintiffs' bringing of two LMRDA claims that were disposed of by grant of summary judgment. In his ruling on cross-motions for summary judgment, the Honorable T. Emmet Clarie held that one count, alleging an improper discipline

claim, could not be maintained in light of a then-recent Supreme Court decision, Breininger v. Sheet Metal Workers International Association, Local Union No. 6, 110 S. Ct. 424 (1989). Of course, Breininger was decided almost five years after the plaintiffs filed their complaint against Patrick Quinn. The court is unable to find that the plaintiffs' improper discipline claim was destined to fail from the start, and therefore finds that a sanction for this claim is not required.

In addition, the court does not find that it must sanction plaintiffs' counsel for the failure of Phelan and Cotton's LMRDA infringement claims against Patrick Quinn. On June 3, 1985, Phelan and Cotton signed a settlement agreement resolving certain NLRB claims brought against Patrick Quinn; this agreement released

Patrick Quinn from all claims which could be brought against him prior to June 3, 1985. Thus, to support their claim, the plaintiffs were required to establish that certain acts occurred after June 3, 1985 which constituted infringement of their LMRDA rights. This support came in the form of hearsay affidavits and a written NLRB ruling (which also was comprised of hearsay statements). Summary judgment was entered in favor of Patrick Quinn by Judge Clarie on May 17, 1990.

An objective analysis of the plaintiffs' claims as they appeared on December 3, 1985 (the date they filed their original complaint) does not clearly indicate that Phelan and Cotton's infringement claims were destined to fail. While the plaintiffs were armed only with hearsay statements to support their claims and oppose the defendant's summary

judgment motion, one of those hearsay statements took the form of an NLRB decision attacking the credibility of Patrick Quinn regarding events occurring in 1985. The court finds that sanctions are not appropriate despite the failure of the plaintiffs to produce admissible evidence to support their LMRDA infringement claims.

B. DEFENDANTS' MOTIONS FOR J.N.O.V. AND NEW TRIAL

The defendants raise numerous arguments in support of their motions for judgment notwithstanding the verdict and for a new trial, including the following: (1) that Terrence Quinn and Local 305 are not liable to the plaintiffs because they were not "members" of Local 305; (2) that the LMRDA does not allow the recovery of damages for the denial of work

opportunities; (3) that the jury failed to properly answer the special interrogatories submitted by the court; (4) that the jury misunderstood the court's instructions as to proximate cause and the time period for which they could award damages, and (5) that there is insufficient evidence to support the jury's verdicts. Each argument will be discussed below.

1. Union Membership

Terrence Quinn and Local 305 argue that they may not be held liable to the plaintiffs for infringement of LMRDA rights because the plaintiffs were not members of Local 305. Although the court has already ruled on this issue, [9] further discussion of the defendants' argument is

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[9] See Ruling on Defendant Local 305 and Terrence Quinn's Motion to Dismiss, filed November 7, 1990 (docket no. 369).

appropriate in light of the facts revealed at trial.

In their amended complaint and at trial, the plaintiffs alleged that each of the three defendants deprived them of certain rights secured by Section 101 (a) of the LMRDA. The relevant LMRDA provisions appear below.[10] Local 305 and Terrence Quinn argue that the court must enter judgment in their favor on the

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[10] Section 101(a) (1) of the LMRDA, 29 U.S.C. Section 411 (a) (1), provides, in pertinent part, that "[e]very member of a labor organization shall have equal rights and privileges within such organization to nominate candidates [and] to vote in elections or referendums of the labor organization...."

Section 101(a) (2) of the LMRDA, 29 U.S.C. Section 411 (a) (2), provides, in pertinent part, that "[e]very member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, ..."

ground that the court does not have subject matter jurisdiction over the plaintiffs' LMRDA claims because the plaintiffs were not members of Local 305. The defendants are correct to note that the court does not have subject matter jurisdiction over claims by non-union members alleging infringement of LMRDA rights. See e.g. Parish v. Legion, 450 F.2d 821, 824 (9th Cir. 1971).

At trial, the parties did not dispute that the plaintiffs were members of Local 76, not Local 305, that the plaintiffs were alleging interference with their attempts to participate in the affairs of Local 76, and that the plaintiffs did not participate in the affairs of Local 305. Indeed, at trial the plaintiffs proved to the jury by clear and convincing evidence that Local 305 and Terrence Quinn engaged in a scheme to suppress their attempts to

voice dissent in Local 76 by offering evidence that they actively opposed the business manager of Local 76. The jury's finding is supported by the evidence.[11]

29 U.S.C. Section 412 confers jurisdiction upon the district courts to hear claims brought by union members seeking redress for infringement of any of the rights secured by the LMRDA. "Labor organization" is defined broadly by the act to include (in pertinent part):

> any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning ... wages, rates of pay, hours, or other terms or conditions of employment,...

29 U.S.C. Section 402 (i). Further, 29 U.S.C. Section 402 (0) defines a "member"

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[11] See Section II.B.5., infra.

of a labor organization to include "any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership" of such organization. None of these statutory definitions supports the contention that sister locals may interfere with the membership rights of union members in their home locals without incurring liability under the LMRDA.

In support of their argument, Local 305 and Terrence Quinn rely upon a narrow reading of the LMRDA definition of "member," as well as cases which support the contention that the plaintiffs had no LMRDA rights to participate in the affairs of Local 305. However, none of the authorities relied upon by the defendants supports the claim that a union local and

its officers may not be held liable for their infringement upon the plaintiffs' exercise of LMRDA rights in a sister local. All of the authorities cited by the defendants stand for the proposition that individuals do not have LMRDA-protected rights within any organization of which they are not members, a conclusion readily apparent from reading the statutory provisions cited above. None of the cases relied upon by the defendants supports the claim that a labor organization (or an officer thereof) may not be held liable for actions which infringe upon the exercise of LMRDA rights by members of sister locals within those sister locals. See Parish v. Legion, 450 F.2d 821, 824 (9th Cir. 1971); Brennan v. Local 357, International Brotherhood of Teamsters, 709 F.2d 611, 614 (9th Cir.

1983); and Gates v. Dalton, 67 F.R.D. 621, 629 (E.D.N.Y. 1975).[12]

In rejecting the defendants' narrow reading of the LMRDA definition of "member," the court is mindful that the LMRDA is remedial in nature and therefore "should be liberally construed to effectuate its purposes." International Bro. of Boilermakers, Etc. v. Braswell, 388 F.2d 193, 201 (5th Cir.), cert. denied, 391 U.S. 935 (1968). The democratic processes established by the LMRDA would be nullified if union officers were allowed to suppress dissent indirectly by inhibiting the job referral process through sister locals. The LMRDA "does not allow [a] union to achieve

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[12] Having found that the LMRDA does confer jurisdiction upon the court over the plaintiffs' claims against Terrence Quinn and Local 305, the court need not address defendant's other arguments relating to subject matter jurisdiction.

indirectly what it is prohibited to do directly." Duncan v. Peninsula Shipbuilders Ass'n., 394 F.2d 237, 240 (4th Cir. 1968). The defendants' reading of the LMRDA is too narrow to effectuate the purposes of the act.

2. Damages for Denial of Work Opportunities

The defendants' second argument in support of their motions for j.n.o.v. or a new trial is the assertion that the LMRDA does not permit recovery for the defendants' refusal to refer the plaintiffs to work opportunities. Specifically, the defendants argue that the Supreme Court's holding in Breininger v. Sheet Metal Workers International Association, Local Union No. 6, 110 S. Ct. 424 (1989), mandates that judgment enter in favor of the defendants. This argument is without merit.

Breininger involved a claim by a union member that the failure of his union officials to refer him to jobs constituted improper discipline in violation of Section 101(a) (5) of the LMRDA, which prohibits a union from disciplining a member without exhausting certain due process rights.[13] The Court in Breininger held that the refusal to make a job referral in that case did not constitute improper discipline within the meaning of LMRDA Section 101 (a) (5) because

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[13] Section 101(a) (5) of the LMRDA, 29 U.S.C. Section 411 (a) (5), provides:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

> the opprobrium of the union as an entity ... was not visited upon [him]. He was not punished by any tribunal, nor was he the subject of any proceedings convened by the respondent.

Id., 110 S. Ct. at 440. In a footnote to the majority opinion, the court limited its holding to claims brought under Section 101 (a) (5), stating that its decision does not extend to LMRDA "infringement" claims, both because the petitioner's infringement claims were not before the court and because the court limited certiorari to the question of "[w]hether a union's discriminatory refusal to refer its members to jobs constitutes 'discipline' within the meaning of the [LMRDA]?" Id. at 440, footnote 18.

In the present case, the plaintiffs alleged in their original complaint a wrongful discipline claim under LMRDA

Section 101 (a) (5), but that claim was dismissed by Judge Clarie.[14] As this court has previously ruled, the LMRDA claims tried to the jury in this case arise under Sections 101 (a) (1) and 101 (a) (2).[15] Thus, the defendants' reliance upon Breininger is misplaced; Breininger does not mandate dismissal of the plaintiffs' Sections 101 (a) (1) and 101 (a) (2) claims against the defendants.

3. Failure of the Jury to Record Deductions

The defendants' third argument in support of their j.n.o.v. and new trial motions focuses upon the Special

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[14] See Ruling on Cross-Motions For Summary Judgment, slip. op. at 23-25.

[15] See Ruling on Defendant Local 305 and Terrence Quinn's Motion to Dismiss, slip op. at 7-8.

Interrogatories answered by the jury at the close of the damages phase of the trial. The interrogatories submitted to the jury contained a section for each defendant entitled "deductions" in which the jury was asked to record any sums which it felt should be deducted from any award of lost wages to the plaintiffs.[16] The deductions section included three spaces in which the jury could describe the nature of any deductions it found to be appropriate (e.g. whether a particular sum was set off because it was unemployment compensation), and had a space for "Total Deductions". This

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[16] At trial, the court ruled in open court that the only compensatory damages the plaintiffs could recover were lost wages. The plaintiff was not allowed to put on evidence of emotional distress because they failed to plead these damages in their amended complaint filed during trial.

deductions section is reprinted below as it appeared in the interrogatories.[17] In each deductions section for each plaintiff, the jury filled in a "0" in the space designated "total deductions", and made no other notations in the deductions sections. The defendants assert that this means that the jury did not reduce its award to account for the plaintiffs' interim earnings, and therefore the court must order a new trial. The court does not agree.

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[17]

Deductions	
Description	**Amount**
1.	$_____
2.	$_____
3.	$_____
Total Deductions	$_____

Rule 49 (a) of the Federal Rules of Civil Procedure vests the court with the discretion to submit special interrogatories to a jury, and enter judgment based on the jury's answers to the interrogatories.[18] Because the jury's

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[18] Rule 49 (a) reads, in pertinent part:

> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and the evidence; or it may use such other method of submitting the issues and requiring the written findings

(continued...)

answers form the basis of the court's judgment, the answers must be consistent with each other. Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 890 (2d Cir. 1988). If the jury's answers are inconsistent and the jury has been dismissed, it is the duty of the court to harmonize the answers; if there is a view of the case which makes the jury's answers to the interrogatories appear consistent, that view must be adopted. Id. at 891; See Gallick v. Baltimore & O.R. Co., 372 U.S. 108, 119 (1963); Atlantic & Gulf Stevedores, Inc. V. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962); 9 Wright & Miller, Federal Practice and Procedure: Civil Section 2510, at 515 (1971). Only if the jury's answers "are in

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[18](...continued)
thereon as it deems most appropriate

irreconcilable conflict" should the court refrain from entering judgment based upon those answers. Brunner v. Maritime Overseas Corp., 779 F.2d 296, 297 (5th Cir.), cert. denied, 476 U.S. 1115 (1986).

In this case, the jury's answers are consistent and reconcilable. The jury did not fill in the amounts they deducted from the awards of compensatory damages to the plaintiffs, but clearly the jury did not award compensatory damages without also accounting for the interim earnings of the plaintiffs. The jury awarded different amounts of back pay to each of the three plaintiffs, and the record fully supports this award. The jury could reasonably award the most back pay to plaintiff Cotton, who received the least amount of interim earnings and unemployment compensation during the period of damages. Similarly, the jury could reasonably award

to plaintiff Phelan less back pay than to plaintiff Cotton; Phelan, although he accrued the least amount of interim earnings of the three plaintiffs, received substantial amounts of unemployment compensation and "loans" from a friend, and was unable to work for a period of time due to illness. Finally, the jury awarded plaintiff Fitzgerald the least amount of back pay, which is consistent with the undisputed fact that Fitzgerald was employed for most of the damages period, and therefore would be entitled to the least amount of back pay. The jury's back pay award is consistent with the court's instruction that interim earnings and unemployment compensation must be deducted from any such award. That the jury chose not to record the exact amounts of any deductions is not fatal to the back pay awards to the plaintiffs.

4. The Jury Misunderstood the Court's Instructions Regarding Proximate Cause and Relevant Time Period.

Defendants Local 305 and Terrence Quinn argue that the jury clearly misunderstood the court's instructions as to proximate cause and the relevant time period in which to assess damages. Specifically, the defendants assert that the jury failed to follow the court's instructions, and committed error, by awarding back pay for the period between December 3, 1982 and June 3, 1985. This argument is without merit.

If the jury had awarded the same amount of compensatory damages to each plaintiff, the defendants would be correct to argue that the jury misunderstood the court's instructions. However, the jury awarded different sums to each of the plaintiffs, which indicates that the jury

considered the damage claims of each plaintiff independent of the other plaintiffs' claims by taking into account the interim earnings of each plaintiff as well as the periods during which each plaintiff was unemployed. In light of the awards of different amounts to each plaintiff, the court does not agree that the jury misunderstood its charge regarding proximate cause.

Further, the evidence does not support the defendants' claim that the jury awarded back pay for the entire period between December 3, 1982 and June 3, 1985 despite the appearance of those dates on the jury form. The income tax returns of the plaintiffs for the period in question indicate that, had the jury awarded back pay for the period between December 3, 1982 and June 3, 1985, that award would be substantially higher than

the actual back pay award conferred by the jury's verdict. The amount of back pay awarded to each of the plaintiffs is consistent with the evidence presented at trial and the court's charge to the jury.

Finally, the court's instructions on how the jury should answer the special interrogatories does not specifically require the jury to record the periods for which back pay was awarded, but rather indicates that the various spaces were provided by the court for guidance in computing damages. The instructions describe the spaces in which the amounts of damages should be recorded as follows:

> In addition to the fourteen special interrogatories, there is a section containing spaces in which you <u>should</u> write the amounts of any compensatory or nominative and/or punitive damages you decide to award each plaintiff, if in fact you decide to award any damages, as well as the time period for which any award of back pay is appropriate

> and the rate of back pay. (emphasis added).

The court's instructions regarding the jury's filling in of the blank spaces in the "Amount of Damages" section is contrasted by the mandatory language used in the instruction regarding the answering of the interrogatories themselves, in which the court stated that

> [e]ach interrogatory must be answered either "yes" or "no". Your answers must be unanimous as to each interrogatory. That is to say, you are not required to answer all of them the same way. You must consider each interrogatory independent of your answers to the other interrogatories.

The jury was not required to fill in every space in the "Amount of Damages" section of the interrogatories form. Although the jury had the opportunity to record back pay awards that encompassed multiple time periods, the jury elected instead to record a singular award. Viewed in this

light, the jury's verdict must stand and defendants' motions must be denied.

5. Lack of Evidence to Support the Jury's Verdict

All three defendants argue that the jury's verdict is unsupported by the evidence. This argument is without merit.

In this circuit, a motion for judgment n.o.v. "may be entered only if, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable people could have reached." Heller v. Champion Int'l Corp., 891 F.2d 432, 434 (2d Cir. 1989). As the Court of Appeals has often stated, judgment n.o.v. should be granted only when:

> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such

> an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [people] could not have arrived at a verdict against it.

Singer v. Olympia Brewing Co., 878 F.2d 596, 598 (2d Cir. 1989), cert. denied, 110 S. Ct. 729 (1990), quoting Bauer v. Raymark Indus., Inc., 849 F.2d 790, 792 (2d Cir. 1988). Further, in this case the court must view the evidence presented to the jury in the light most favorable to the plaintiffs, and all inferences must be drawn in their favor. Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d 127, 132 (2d Cir. 1986).

The defendants have not met the onerous burden carried by parties seeking judgment n.o.v. From the evidence presented at trial, the jury could reasonably have found that each of the defendants engaged in a scheme to suppress dissent and inhibited the plaintiffs'

LMRDA rights. The plaintiffs opposed Patrick Quinn politically within their union, and there was testimony that Fitzgerald was referred to Millstone only after promising to "stay out of [Patrick Quinn's] face." There was also testimony from plaintiff Fitzgerald and Dennis Segal that Patrick Quinn stated that he would "get even" with Fitzgerald for causing him difficulty with the union. Also, there was testimony that the plaintiffs had opposed Patrick Quinn on numerous occasions, that Patrick and Terrence Quinn are brothers, and that members of Local 76 could not obtain work at Millstone without obtaining a travel card from Patrick Quinn and registering with Local 305 through Terrence Quinn.

In addition, the plaintiffs were not allowed to sign the Local 305 "out of work" book on February 27, 1985, despite

receiving a letter from former counsel for the local indicating that they would be allowed to sign the book. Phone records revealed that a telephone call was made to Local 76 during the period of time the plaintiffs were at Local 305 on that day, and Terrence Quinn admitted that he spoke with his secretary by telephone on February 27, 1985 while the plaintiffs were at the union hall, but did not tell the secretary to allow the plaintiffs to sign the out of work book. Further, the out of work books maintained by Local 305 show that individuals who registered for work after the plaintiffs were referred to jobs before the plaintiffs.

Although the above recitation of facts is not exhaustive, it is sufficient to establish that defendants' motions for judgment n.o.v. should not be granted. The record establishes that the jury's

verdict was not the product of sheer surmise and conjecture, and the evidence is not so overwhelmingly supportive of the defendants' position that the grant of judgment n.o.v. is warranted. The evidence submitted at trial, without considering its credibility and weight, is sufficient to support the verdicts of the jury in this case.

Finally, defendant Patrick Quinn argues that plaintiff Fitzgerald's case "is based on a theory that the jury should disbelieve Patrick Quinn's evidence and, based on that disbelief, conclude that the facts are to the contrary." See Patrick Quinn's Reply Memo. at 6 (docket no. 455). Defendant Patrick Quinn correctly states that the jury was not entitled to find for Fitzgerald solely on the basis that it chose to disbelieve the testimony of Patrick Quinn's witnesses. However, as

illustrated by the above recitation of facts, the court does not find that the jury relied solely upon disbelief of Patrick Quinn's evidence in reaching its verdict. The defendants' motions for judgment n.o.v. are denied.

III. CONCLUSION

For the foregoing reasons, the defendant Patrick Quinn's Motion for Rule 11 Sanctions (docket no. 310) is granted in part and denied in part. Defendant Patrick Quinn's Motions for Directed Verdict, Judgment N.O.V. and a New Trial (docket no. 429) are denied. Defendants Local 305 and Terrence Quinn's Motions for Directed Verdict, Judgment N.O.V. and a New Trial (docket no. 429) are denied. Defendants Local 305 and Terrence Quinn's Motions for Directed Verdict, Judgment N.O.V. and a New Trial (docket no. 430) are denied.

It is further ORDERED that counsel for Patrick Quinn submit to the court, within 10 days of receipt of this memorandum and order, the appropriate motion and necessary documentation in support of his claim for attorney's fees consistent with this ruling on his motion for sanctions. Counsel for the plaintiffs shall respond to the motion for attorney's fees within ten days after the filing of defendant's motion.

So ORDERED at Hartford, Connecticut this 25th day of March, 1991.

F. Owen Eagan
United States Magistrate Judge

Supreme Court, U.S.
FILED
FEB 17 1993

No. 92-1158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KAREN M. PHELAN AND CHARLENE PHELAN, AS CO-ADMINISTRATORS OF THE ESTATE OF SHANE P. PHELAN, DONALD V. FITZGERALD AND MARK COTTON,
Petitioners,

v.

LOCAL 305 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA AND TERRENCE QUINN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

A. The petitioners here, who were plaintiffs in the trial court, are Shane P. Phelan, Donald V. Fitzgerald, and Mark Cotton, each of whom, at all times relevant to this litigation, was a member of Local 76, a local building trades craft union located in Hartford, Connecti-

cut. Local 76 is affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("United Association"), an international building trades craft union with local affiliates throughout the nation.

The respondents here, who were among the defendants in the trial court, are Local 305, another local building trades craft union that is affiliated with the United Association, and the business manager of Local 305, Terrence Quinn. Local 305 is located in Uncasville, Connecticut. None of the petitioners were members of Local 305.

In essence, the petitioners' claim in this case is that when petitioners sought work through the Local 305 hiring hall, Local 305 and its business manager, Terrence Quinn, discriminated against petitioners because they were active in the internal political affairs of Local 76 as political opponents of Local 76's business manager, Patrick Quinn. Patrick Quinn is Terrence Quinn's brother. And, petitioners further claim that such hiring hall discrimination by Local 305 and its business manager—even if directed against individuals who are not members of Local 305—constitutes a violation of Title I of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §§ 411 *et seq.*, which regulates the internal affairs of unions by providing union members a bill of rights.

Given the nature of this claim, two background points are worthy of note.

First, the hiring hall in question was operated by Local 305 pursuant to collective bargaining agreements between that local and area employers and, like all such hiring halls, was required, under the National Labor Relations Act ("NLRA"), to accept and refer applicants without regard to the applicant's union membership. *See* p. 8, *infra*. *See also* 29 U.S.C. §§ 158(b)(1)(A) & (2); J.A. 730.

Second, the United Association's Constitution requires that a member of one affiliated local union deposit a "travel card" obtained from his/her home local with any other local in which he/she is seeking work. That Constitution also specifies that such a "traveler" does not thereby become a member of the second local. Rather, the traveler remains a full member of his/her home local—with all rights and obligations within that home local continuing in full force—unless and until the traveler applies for transfer and satisfies the detailed transfer requirements of the United Association. Pet. App. 24a-26a. It is undisputed that none of the petitioners ever sought—much less effected—a transfer of his membership from Local 76 to Local 305.

B. In February 1985, ten months prior to filing the instant action in federal court, petitioners filed charges with the National Labor Relations Board ("NLRB"), alleging that the actions of Local 305 at issue in this case constituted unfair labor practices under NLRA §§ 8(b)(1)(A) and 8(b)(2), 29 U.S.C. §§ 158(b)(1)(A) & 158(b)(2), in that those actions amounted to unlawful hiring hall discrimination by Local 305 against petitioners. Petitioners prevailed before the NLRB on these hiring hall discrimination claims and received a substantial backpay award. Pet. App. 8a; J.A. 1616, 1633.

In addition, two of the three petitioners (Phelan and Cotton)—along with another Local 76 member who is not involved in the instant case—also filed NLRB charges against their home local, Local 76, alleging that Local 76, through business manager Patrick Quinn, had engaged in discriminatory actions against them with respect to their efforts to obtain out-of-town employment. Pursuant to a settlement of those charges—reached in June 1985—Local 76 agreed to pay the charging parties a substantial monetary sum in return for the charging parties' release of any and all Local 76 officers and agents from any

liability for discriminatory actions that might have been within the scope of the NLRB charges and that occurred prior to the date of the agreement. Pet. App. 9a-10a, 61a-63a; J.A. 1652, 1664, 1666-1667.

Then, on December 3, 1985, petitioners filed the instant suit against, *inter alia*, Local 305 and Terrence Quinn. Among petitioners' allegations against respondents was the claim that the discriminatory hiring practices at issue constituted a breach of the duty of fair representation that Local 305 owes to job applicants by virtue of the NLRA, and the claim that the same practices constituted a violation of Title I of the LMRDA. With respect to the Title I claims, petitioners did not allege in their complaint that Local 305 or Terrence Quinn were agents of Local 76; and throughout this litigation, petitioners have reaffirmed that their theory of Title I liability is *not* based on any such theory of agency. *See* Pet. App. 18a; *see also* Brief of Plaintiffs-Appellees/Cross-Appellants in Second Circuit, No. 91-9145L, at 19 n.17.[1]

C. On May 17, 1990, the United States District Court for the District of Connecticut dismissed petitioners' duty of fair representation claim on statute of limitations grounds. In later rulings, the district court refused to dismiss the Title I claims, rejecting respondents' argument that Title I provides subject matter jurisdiction

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[1] The complaint included a number of other theories of action and a number of other defendants. Other defendants named in the complaint included the United Association, a plumbing industry employer, two employer associations, and Patrick Quinn. The district court dismissed all claims against the employer, and no appeal was taken. The district court also dismissed all claims against the United Association, and the Second Circuit rejected petitioners' challenges to those dismissals. The claims against the employer associations were all withdrawn. Some claims against Patrick Quinn have been dismissed, others sustained, and others await further proceedings.

No defendants in this case, other than Local 305 and Terrence Quinn, are respondents in this Court. No claims other than the Title I claims are here at issue.

only with respect to claims brought by union members against the union with which those plaintiffs have a union-member relationship (and the agents of that union). Pet. App. 68a-79a, 95a-102a.

On November 16, 1990, petitioners prevailed on these Title I claims in a jury trial conducted by a magistrate, with the jury awarding backpay and punitive damages against respondents. Pet. App. 13a.

On August 25, 1992, in the decision that is the subject of the instant petition, the United States Court of Appeals for the Second Circuit reversed the judgment of the district court with respect to the Title I issue. In a unanimous opinion by Circuit Judge Meskill—joined by Circuit Judge Newman and District Judge Arcara (sitting by designation)—the Second Circuit held that Title I regulates only the relationship between a union and its members and thus grants rights to union members only against the union to which they belong (as well as agents of that union). On this basis, the Second Circuit dismissed petitioners' Title I claims. Pet. App. 13a-26a.

ARGUMENT

The Second Circuit's decision in this case is the most recent of a long, uniform line of decisions that recognize—and rest on—the proposition that Congress, in passing Title I of the LMRDA, "'regulated only the relationship between [a] union and its members,' not other relationships." Pet. App. 16a (*quoting Abrams v. Carrier Corp.*, 434 F.2d 1234, 1250 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971). This proposition is deeply grounded in the LMRDA's statutory language, history and structure. *See* pp. 7-8, *infra*.

Given this, the decision below is not only clearly correct; it is unexceptional. Petitioners' claim of a conflict in the circuits on the issue presented here—whether a

member of one local union has a valid LMRDA Title I claim against a second local union without making any showing that the second local is acting as the agency of the first—is unsound. *See* pp. 10-11, *infra*. Petitioners' claim that this issue is of general practical importance is even more devoid of substance. *See* p. 9, *infra*. Petitioners' effort to create a conflict at the level of general principle between the fact-specific decision below and Title I decisions treating with entirely distinct legal questions rests on a misreading of the decisions petitioners invoke. *See* pp. 11-12 *infra*. And, petitioners' argument that all affiliated local unions should be treated as a single legal entity ignores 70 years of this Court's jurisprudence. *See* pp. 12-13, *infra*.

For all of these reasons, the *certiorari* petition should be denied.

A. The federal courts have time and again dismissed LMRDA Title I claims alleging interference with, or retaliation for, a union member's internal union activities when those claims are directed against *any* defendant other than (i) the union to which the plaintiff belongs or (ii) a person acting as the agent of such a union and exercising that union's authority over its members. The decision below rests on and continues this consensus. *See, e.g., Bass v. Boilermakers Local 582*, 630 F.2d 1058 (5th Cir. 1981) (dismissing Title I claims by union members against apprenticeship trust fund); *Gavin v. Structural Iron Workers Local No. 1*, 553 F.2d 28 (7th Cir. 1977) (dismissing Title I claims by union members against a local union other than the local to which plaintiffs belonged); *Miller v. Holden*, 535 F.2d 912 (5th Cir. 1976) (dismissing Title I claims by union members against education trust); *Hays v. Consolidated Serv. Corp.*, 517 F.2d 564 (1st Cir. 1975) (dismissing Title I claims by union members against employer); *Abrams v. Carrier Corp., supra* (same); *Duncan v. Peninsula Shipbuilding Ass'n*, 394 F.2d 137 (4th Cir. 1968) (same);

Thompson v. New York Cent. R.R. Co., 361 F.2d 137, 145 (2d Cir. 1966) (same); *Tomko v. Hilbert*, 288 F.2d 625 (3d Cir. 1961) (dismissing Title I claims by union member against fellow union member who acted without any apparent authority from the relevant union); *Tobin v. Barry*, 678 F.Supp. 1018, 1028 (S.D.N.Y. 1987) (dismissing Title I claims by union member against employer association); *Maier v. Patterson*, 553 F.Supp. 150 (E.D. Pa. 1982) (dismissing Title I claims by union member against union officer who acted without any apparent authority from the relevant union).

B. Not surprisingly, this wealth of decisional law is firmly grounded in the language and legislative history of Title I. The LMRDA provides that to be a "member" of a labor organization an individual must have "fulfilled the requirements for membership in such organization." LMRDA § 3(o), 29 U.S.C. § 402(o). Petitioners could not meet this definition of membership with respect to Local 305, since, contrary to the applicable United Association requirements, petitioners never even applied for Local 305 membership. *See* Pet. App. 25a-26a. And, each of the statutory provisions stating the rights asserted in the instant action describe those rights with specific reference to the union to which the member belongs. *See, e.g.*, LMRDA § 101(a)(1), 29 U.S.C. § 411(a)(1) (providing each member of a labor organization with equal rights of participation "within such organization," subject to reasonable rules "in such organization's constitution and bylaws"); LMRDA § 101(a)(2), 29 U.S.C. § 401(a)(2) (providing each member of a labor organization with the right to freely speak and assemble "with the members . . . of the labor organization," subject to "the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member towards the organization as an institution").

Title I's legislative history is to the same effect. Senator McClellan—who sponsored the floor amendment that

became Title I—explained that the purpose of his proposal was to establish "minimum standards of democratic process and conduct for the administration of *internal union affairs*" in order to ensure that "the individual worker" would not be "helpless *within his union*," and in order that "unions . . . should be compelled by law to represent *their members* in accordance with democratic principles." *See* 105 Cong. Rec. 5806 (1959) (emphasis added), *reprinted at* II NLRB, Legislative History of the LMRDA 1098. Title I's legislative history does *not* contain a single reference to providing a union member any rights vis-a-vis any person outside of the union-member relationship.

C. Petitioners do not point to anything in the LMRDA or its legislative history that suggests a congressional intent to grant rights or impose duties that go beyond the union-member relationship. Instead, petitioners rest on the claim that the LMRDA *must* be given such a broad scope to safeguard against the possibility that a local union—especially one operating a hiring hall—might otherwise be free to engage in invidious discrimination against the members of "sister" local unions. *See* Pet. 13-16. Nothing could be further from the truth.

First, any kind of discrimination by a local union in administering its hiring hall based on the applicant's union activities or union membership—regardless of the identity of the applicant's union—is a clear unfair labor practice under NLRA §§ 8(b)(1)(A) and 8(b)(2), 29 U.S.C. §§ 158(b)(1)(A) & 158(b)(2). *See* Hardin, *The Developing Labor Law*, 270-71 (1992) ("refusal to dispatch 'travelers' or refusal to refer members because of their criticism of or opposition to union leadership violates sections 8(b)(1)(A) and 8(b)(2) of the [National Labor Relations] Act"). *See generally Breininger v. Sheet Metal Workers*, 493 U.S. 67, 75-76 n.3 (1989) (summarizing NLRB decisional law on hiring hall discrimination); Hardin, *supra*, at 270-74, 1537-43 (same).

Indeed, as we have noted, petitioners here filed charges against Local 305 on precisely this theory and prevailed before the NLRB, obtaining a substantial backpay award. *See* p. 3, *supra*; *see also* Pet. App. 8a.

Second, this kind of hiring hall discrimination is also a clear violation of a union's statutory duty of fair representation under the NLRA and is actionable in court as such. *See Breininger v. Sheet Metal Workers*, *supra*, 493 U.S. at 73-90 (upholding duty of fair representation action for damages brought by victim of politically motivated hiring hall discrimination). Again, as we have noted, petitioners pled a duty of fair representation claim premised on precisely this theory in their complaint. *See* p. 4, *supra*. This claim was dismissed *only because petitioners' claim in this regard was time-barred. See id.*; *see also* Pet. App. 26a-43a.

Third, there is authority that hiring hall discrimination by a local union other than the union to which the plaintiffs belong may give rise to Title I liability, *if the plaintiffs allege and prove that the "sister local" or its officers were acting as agents of the union in which plaintiffs were members.* But, as the Second Circuit noted, *petitioners in this case expressly disclaimed any such theory. See* Pet. App. 18a; *see also* p. 4, *supra*.[2]

Plainly, then, there are ample deterrents to union misconduct of the kind complained of here. The hyper-technical question presented by the petitioners here arises only because of the peculiar litigation history of this case. The decision below simply has no general, practical import.

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[2] This litigation decision by petitioners may have been a consequence of the fact that, as we have noted, two of the three petitioners had entered into a comprehensive settlement agreement with Local 76—viz., the local to which they belonged—waiving further actions against that local *or its agents*. *See* Pet. App. 18a, 61a-64a. *See also* pp. 3-4, *supra*.

D. Petitioners have cited only one federal case in which union members have been permitted to proceed with an LMRDA Title I action against a union other than the union to which those plaintiffs belonged. *Harris v. Plasterers & Cement Masons Local No. 406*, 619 F.2d 1164 (7th Cir. 1980). But, *Harris* decided *only* that, under certain very narrow circumstances, it is proper to treat one local union *as the agent* of a second local union, exercising that second union's legal authority with regard to the membership rights of that second union's members. *Harris* does *not* support the broad proposition that an individual can generally bring Title I claims against a local union with which that individual has no union-member relationship.[3]

Given its limited scope, *Harris* is not in conflict with the decision here .

First, as the Second Circuit noted, "plaintiffs expressly disclaim[ed] an agency theory in this case." Pet. App. 18a. *See also* p. 4, *supra*. What petitioners asserted here, and what the Second Circuit rejected, was a claim that a

[3] The plaintiffs in *Harris* lost their membership in their local union because of allegedly improper disciplinary proceedings taken against them by a "sister" local union while plaintiffs worked under the jurisdiction of that "sister" local. Plaintiffs had not become members of the "sister" local. As the Seventh Circuit explained, the "sister" local's action affected the plaintiffs' membership rights in their own local only because the constitution of the international union—a document to which both local unions had agreed—obliged a local union to expel any member if the member failed to pay any disciplinary fines imposed by another local while the member worked under that other union's jurisdiction. *See* 619 F.2d at 1167.

Under these circumstances, the Seventh Circuit concluded that plaintiffs' home local "had, through the constitution, delegated [its] disciplinary power over [its own] members to any local under whose jurisdiction a traveling member worked." *Id.* Because the "sister" local exercised this delegated disciplinary power to obtain the expulsion of plaintiffs from the local in which they were members, the "sister" local acted in this regard as an agent of the home local, wielding the home local's legal authority over its members. *Id.*

Title I action lies against a defendant union to which the plaintiff does not belong *even where that union is not acting as the agent of the union to which the plaintiff does belong.* Therefore, *Harris*, which rests on a theory of agency, is of no help to petitioners.

Second, even apart from petitioners' disclaimer, *Harris* has no application to the facts of this case. The actions of the "sister" local union here which form the basis of petitioners' complaint—all of which involve the "sister" local's operation of its own hiring hall, and none of which altered the plaintiffs' membership status in their home local—do not even arguably constitute the exercise of a delegation of authority by petitioners' home local union over the membership rights and status of the latter's members. Indeed, *Gavin v. Structural Iron Workers Local No. 1*, 553 F.2d 28 (7th Cir. 1977), suggests that for this reason petitioners' Title I claims would have been dismissed even if brought in the Seventh Circuit. *Gavin* dismissed a Title I action by members of one local union against a "sister" local union within whose jurisdiction the plaintiffs were working, on the basis that plaintiffs were only working in the "sister" local's jurisdiction and were not members of the "sister" local.

Against this background, there is no conflict between the decision below and the Seventh Circuit's *Harris* decision regarding any Title I issue actually presented here. To be sure, the Second Circuit decision states that the court "declined to follow" *Harris*, and expressly criticized the *Harris* case's flexible approach to Title I jurisdiction. Pet. App. 20a. While we share the Second Circuit's position in this regard, we emphasize that, because petitioners' claim here would have no merit even under *Harris*, the potential conflict between *Harris* and the decision below is purely hypothetical with regard to any issues actually presented by this case.

E. Petitioners cite *Shimman v. Frank*, 625 F.2d 80 (6th Cir. 1980) and *Finnegan v. Leu*, 456 U.S. 431, 441

(1982), for the broad proposition "that *any* person who participates in a scheme to suppress union dissent is liable to his victims under the LMRDA." Pet. 20-21 (emphasis added). Petitioners also cite *Keene v. Operating Engineers*, 569 F.2d 1375, 1381 (5th Cir. 1978), and *Morrissey v. NMU*, 544 F.2d 19, 24 (2d Cir. 1976), for the broad proposition that an individual's exercise of *any* union authority can be the basis of Title I liability. *See* Pet. 22-23. Petitioners then argue that the decision below is concontrary to these basic principles of LMRDA law.

Very simply stated, petitioners misread *Shimman, Keene, Morrissey* and *Finnegan*. Each of these cases concerned the scope of Title I claims in the context of defendants who acted *under color of the authority of the union to which the plaintiffs belonged*. None is even remotely concerned with the proper approach to cases such as this one—in which the plaintiffs and defendants had no union-member relationship.[4]

F. The close of the *certiorari* petition is devoted to the argument that Title I should be construed to cover all claims by the members of one local union against any *affiliated* "sister" local. *See* Pet. 23-25. This is so, the petitioners argue—*without any supporting citations at all*—because all union authority within any international union stems from the international. The affiliated sister local unions are, under this view, simply subdivisions of the same union authority. *See, e.g.*, Pet. 24. ("It is the constitution of an international union which . . . legiti-

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[4] *See, Finnegan, supra* (action by a union member against his own union alleging an unlawful dismissal from his position as employee of that union); *Shimman, supra* (action by local union members against an officer of same local, and against two local members who, at the local officer's urging, attended local meetings to prevent dissidents from speaking); *Keene, supra* (action by local union member against officers of same local union); *Morrissey, supra* (action by international union member against officers of same international union).

mizes *all* union authority. The authority of a local official derives from the international's [authority], and is delegated to him or her by the constitution.")

There is no mystery as to why petitioners cite no authority for this view of the relationship between an international union and its affiliated local unions. The reason is that *no* authority for this view exists. Indeed, for at least 70 years, it has been well-settled by this Court that local unions which have affiliated with an international union do not by that affiliation lose their status as autonomous, legally separate entities, whose actions are presumed to be independent exercises of their own authority in the absence of contrary proof. *See United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 395 (1922) (holding that local unions which had affiliated within highly centralized international unions were nevertheless presumed to be legally autonomous entities exercising independent authority); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 304-305 (1925) (same). *See also Plumbers v. Plumbers Local 334*, 452 U.S. 615, 619 (1981) (reaffirming the *Coronado Coal* understanding of the autonomy of local unions); *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 217 (1979) (same).[5]

Since the United Association's constitution does *not* make members of one local union members of all local unions, and does not render the actions of Local 305 the actions of the United Association, or of any other local union, petitioners' argument in this regard is contrary to the governing law as stated by this Court.

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[5] Various provisions of the LMRDA itself are premised on Congress' recognition of this principle and Congress' decision to bolster the very autonomy of local unions that petitioners discount. *See, e.g.*, LMRDA Title III, 29 U.S.C. §§ 461-466 (limitations on international union power to undermine local union autonomy and authority through use of trusteeships).

CONCLUSION

For the foregoing reasons, this case presents no issues worthy of this Court's plenary review. Accordingly the petition should be denied.

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Supreme Court, U.S.
FILED
FEB 23 1993
OFFICE OF THE CLERK

No. 92-1158

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

KAREN M. PHELAN AND CHARLENE PHELAN,
AS CO-ADMINISTRATORS OF THE
ESTATE OF SHANE P. PHELAN,
DONALD V. FITZGERALD AND MARK COTTON
PETITIONERS,

V.

LOCAL 305 OF THE UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES
OF THE UNITED STATES AND CANADA
AND TERRENCE QUINN
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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February 23, 1993

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REPLY TO RESPONDENTS' BRIEF

A. CONFLICT BETWEEN SECOND AND SEVENTH CIRCUITS

In an effort to mask the conflict between the Second Circuit's decision in this case and the Seventh Circuit's decision in Harris v. Plasterers & Cement Masons Local No. 406, 619 F.2d 1164 (7th Cir. 1980), the Respondents incorrectly characterize Harris as a case decided on the basis of agency. (Respondent's Brief at 10). Their argument is that since Harris was decided on the basis of agency, and since liability in this case is not based on agency, the conflict is illusory. In Harris, the offending local (Local 406) had been delegated power by the International's constitution to impose fines on the plaintiffs. The plaintiffs had to pay the fines, or else be expelled from the International and their home

locals. 619 F.2d 1164.

There is nothing in Harris which even hints at Local 406 playing the role of an agent. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency, Section 1 (1958). The plaintiffs' home locals had not instructed Local 406 to be their agents in disciplining the plaintiffs. Rather, Local 406, exercising power delegated to it by the International constitution, acted on its own. The locals were autonomous and equal; neither was the agent of the other. But because Local 406 "had jurisdiction ... under the constitution of the International" to impose fines, it had the power to take actions which created a ripple effect,

resulting in the expulsion of the plaintiffs from their home locals. 619 F.2d at 1167.[1]

The case at bar is fundamentally the same. Local 305 and Terrence Quinn, exercising the jurisdiction delegated to them by the International's constitution, ran the traveling system in their locality. They were not Patrick Quinn's agents (though they were his co-conspirators), and they took actions within their jurisdiction to deprive the plaintiffs of their referral rights as

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[1] The Respondents devote a sizable portion of their brief to arguing that union locals are autonomous. The Petitioners never argued differently. However, an International's constitution regulates the relations between and among locals and union officials. The constitution defines and delineates the authority and responsibility of each, and it is the source of authority for each local and each local official in their dealings with other locals and other officials.

part of a scheme to suppress Petitioners' rights of free speech, association and access to the NLRB. Thus, the fact that the Second Circuit and the Seventh Circuit decided differently presents an irreconcilable conflict between circuits.

The Respondents argue that under Gavin v. Structural Iron Workers Local No. 1, 553 F.2d 28 (7th Cir. 1977) even the Seventh Circuit would have dismissed the plaintiffs' claims in the case at bar. They are wrong about Gavin. In Gavin, several putative transferees from other locals complained that Local 1 would not take them in as members. All but one of the plaintiffs had their cases dismissed, not on jurisdictional grounds but on the substantive ground that they had not stated a claim. The Seventh Circuit ruled that because the International had recently amended its constitution to

give the local discretion to reject applicants, all but one of the plaintiffs had to fail. However, the Seventh Circuit was very explicit in stating that if the constitution had not been amended to confer discretion on the local, the plaintiffs would have stated a valid LMRDA claim. In fact, for a plaintiff named Coyne, who had been rejected for membership before the constitution was changed, the Seventh Circuit permitted his case to proceed.

Gavin's relevance to this case is that it **strengthens** the Petitioners' claims. Under the travel card provision of the International constitution, Terrence Quinn and Local 305 had no discretion to turn the plaintiffs away. The Respondents were required by the International constitution to accept the travel cards and refer the Petitioners out

to work.

B. RESPONDENTS' MISLEADING ACCOUNT OF DECISIONAL LAW

The Respondents are extremely misleading when they list a string of cases which supposedly demonstrate that decisional law has consistently gone against the Petitioners' claims. (The list appears on pages 6-7 of the Respondents' brief). Of the ten cases listed, 7 of them stand for the proposition that employers, or independent entities financed and partly controlled by employers, are not subject to LMRDA suits. In other words, to make it appear that the weight of decisional law goes against the Petitioners, the Respondents cited seven cases saying the same thing, none of which are relevant to the case at bar.

Abrams v. Carrier Corp., 434 F.2d

1234 (2nd Cir. 1970), Thompson v. New York Central Railroad Company, 361 F.2d 137 (2nd Cir. 1966), Duncan v. Peninsula Shipbuilding Ass'n, 394 F.2d 237, Tobin v. Barry, 678 F.Supp. 1018, 1019-1020 (S.D.N.Y. 1987), and Hayes v. Consolidated Service Corporation, 517 F.2d 564 (1st Cir. 1975), all hold that employers cannot be sued under the LMRDA. This rule is based on the fact that the LMRDA was designed to promote internal union democracy. Employers by definition do not impact on internal democratic processes and do not act under color of union authority. Bass v. International Broth. of Boilermakers Local 582, 630 F.2d 1058 (5th Cir. 1980) and Miller v. Holden, 535 F.2d 912 (5th Cir. 1976) hold that the LMRDA does not provide jurisdiction over a joint trust that is completely independent of the union, which is financed by employers,

and which is fifty-percent controlled by employer-appointed trustees. Bass, 630 F.2d at 1066. Miller, 535 F.2d at 914. These cases are merely subsets of the employer cases discussed above. This is particularly clear in Bass, where the court held that if there had been evidence that the trust was an alter ego of the union, there would be LMRDA jurisdiction. 630 F.2d at 1066.

Gavin v. Structural Iron Workers Local No. 1, 553 F.2d 28 (7th Cir. 1977) has already been discussed. Suffice it to say that its holding is not, as Respondents claim, that union members cannot bring a claim against a union local to which they do not belong.

Similarly, Maier v. Patterson, 553 F.Supp. 150 (E.D. Pa 1982) does not hold, as Respondents suggest, that the LMRDA cannot support a claim against an

individual union officer acting without authority from the local. In Maier, the district court directed a verdict against the union and against a union official in his official capacity. Contrary to the respondent's contention, the court did not dismiss claims brought against the union official individually. The court's directed verdict was an evidentiary decision, not a jurisdictional one. In fact, it is clear the Maier court believed the LMRDA did confer jurisdiction to hear the case, for the court had previously denied summary judgment motions and permitted the case to go to a trial.

The remaining case, Tomko v. Hilbert, 288 F.2d 625 (3d Cir. 1961), was a dismissal of a claim which did not implicate union democracy. A union official had committed a private tort, but had not done it to infringe the

plaintiffs' LMRDA rights. The reasoning of the case is fundamentally the same as the employer and trust fund cases: The LMRDA was designed as a weapon in the fight for union democracy, and cases which have nothing to do with union democracy are not LMRDA cases. 288 F.2d at 629.

Taken together, the cases cited by the Respondents say nothing more profound than that the LMRDA was meant to enforce union democracy. They are not relevant to the case at bar, since this was first, last, and always a union democracy case.

C. MERITS OF THE CASE AND LEGISLATIVE HISTORY

Much of the Respondents' brief is devoted to discussing the merits of the case rather than the question of whether this Court should grant certiorari. The Petitioners are therefore compelled to

give at least a brief response.

The Petitioners were not members of Local 305, but the International's constitution guaranteed to them many of the privileges of membership. The Petitioners had an absolute right to register with Local 305 and to get job referrals along with Local 305 members and all other travelers. They also had the right to attend meetings of Local 305 and to demand protection by Local 305 and Terrence Quinn in all events occurring within Local 305's geographical area. The constitution also imposed obligations on the Petitioners. They were required to pay dues to Local 305 and to abide by Local 305's rules and practices.

Section 101(a)(2) of Labor Management Reporting and Disclosure Act of 1959 guarantees that **every "member** of any labor organization ... shall have the right to

meet and assemble freely with other members; and to express any views, arguments, and opinions...." (emphasis added) Section 101(a)(4) guarantees unfettered access to administrative bodies like the NLRB. The Petitioners were members of a labor organization, so it is clear the LMRDA protected their freedom of speech and association and access to the NLRB.

Section 102 of the LMRDA, 29 U.S.C. Section 412, gives a private right of action **to all individuals** protected by Section 101(a)(2) and (4). **"Any person** whose rights secured by the provisions of this title have been infringed ... may bring a civil action...." (emphasis added) Since the plaintiffs were union members whose protected union rights were infringed, Section 102 by its plain terms was available to the plaintiffs to sue the

perpetrators.

The prerequisite of union membership refers to **plaintiffs**, not to defendants. There is nothing in the statute which even hints at a requirement that, in addition to the plaintiff being a union member, he or she must also be a full-fledged member of the defendant union. In fact, the second sentence of Section 102 suggests the very opposite. It is a venue provision to be applied when the defendant is a union. The clear implication is that the statute has broader application than use solely against a union of which the plaintiff is a member. If this were not so, the second sentence would be redundant.

The legislative history shows the LMRDA was designed to cover the Petitioners' actions against both Local

305 and Terrence Quinn.[2] Senator McClellan, a chief architect of the LMRDA, made it clear the purpose of the law was to protect union members from reprisals of **all kinds**. During the legislative hearings on the LMRDA, Senator McClellan stated that the purpose of Title I of the LMRDA was

> to prescribe and define by law

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[2] It should be remembered that separate claims were brought against Local 305 and Terrence Quinn, and the jury found that each of them had engaged in the scheme to suppress dissent. It is conceivable that, if this Court were to adjudicate this case on the merits, the verdict against Terrence Quinn could be upheld even while holding that the LMRDA did not grant jurisdiction over the Petitioners' claim against Local 305. Though the Petitioners would not urge this result, such a result would go a long ways toward resolving at least the conflict between the Second Circuit's decision below, and Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980), Morrissey v. NMU, 544 F. 2d 19 (2d Cir. 1976), and Keene v. International Union of Operating Engineers, 569 F.2d 1375 (5th Cir. 1978). This conflict is discussed in the Petition, at pages 20-25.

> what the rights of union members are, place in them by the democratic process the power to secure those rights, and protect them in their efforts to do so from **reprisals of any kind** .... Without such protection, other provisions of law may be of little benefit and meaningless. ... [T]he records of our committee's investigations show over and over again that a rank-and-file member dare not risk any opposition to a corrupt or autocratic leadership. If he does so, he may be beaten, his family threatened, his property destroyed or damaged, and he may be forced out of his job -- all of these things can happen and have happened.

II NLRB, Legislative History of the LMRDA at 1098 (1959) (emphasis added).

Senator McClellan's broad definition of reprisals included job loss, bodily harm, and threats to family; but he did not stop there -- he called for a halt to reprisals of "any kind". The legislative history demonstrates that Congress sought to guard against infringements of LMRDA rights from any sources associated with

union leadership, whether or not the reprisals were actually carried out by the union officials with direct control over members' rights. Senator McClellan specifically referred to the practice by which union officials recruited others to accomplish the infringement of members' rights:

> Union officers send to other places and bring in thugs and hoodlums. If a union member undertakes to speak ... they move over toward him and say, "Be quiet, Bud. You are out of order." And he had better be quiet, too. They mean business.

Id. at 1103.

The Petitioners' situations are analogous to the ones described by Senator McClellan, the only difference being that in his example "hoodlums" -- rather than a sister local or the business manager of that local -- acted to infringe the union members' free speech rights.

Congress did not intend LMRDA jurisdiction to turn on technicalities such as whether the perpetrator was an agent, co-conspirator, independent contractor, or something else. Yet this is precisely how the Second Circuit and the Respondents would have it. To hold that there was no LMRDA jurisdiction over Respondents because Respondents were "merely" co-conspirators and not agents is exalting form over substance.[3] As long as the pepetrators were acting under color of union authority, engaged in a scheme to suppress dissent within the union, there should be LMRDA jurisdiction. Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980). Morrissey v. NMU, 544 F. 2d 19 (2d Cir. 1976). Keene v. International Union of Operating Engineers, 569 F.2d 1375 (5th

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[3] "Agency" is defined above, on page 2.

Cir. 1978).

D. RESPONDENTS' EFFORT TO TRIVIALIZE THIS CASE

In an effort to convince this Court not to consider this case on the merits, the Respondents characterize it as presenting a "hyper-technical question ... [which] has no general, practical import." (Respondents' Brief at 9.) But when this case was pending before the Second Circuit, the Respondents sang a different tune, arguing to the Second Circuit that great damage would accrue to unions if the trial court were upheld. In fact, the Building and Construction Trades Department of the AFL-CIO was invited to submit an amicus brief, and the AFL-CIO stated:

> The acceptance of plaintiffs' arguments would seriously disrupt the existing practices concerning travellers and transfers. That disruption would, in turn, have an adverse

> effect on the essential functions of local labor organizations in [the construction] industry .... This deleterious effect upon the workings of construction industry labor organizations stands as additional support for reversing the ruling of the court below on this issue.

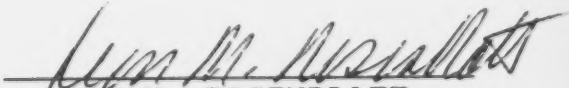
Amicus Brief filed by the Building and Construction Trades Department, AFL-CIO, at page 16.

The truth is, both sides know that this is a very important case, which will have far-reaching impact whether or not the Supreme Court grants this petition. If the petition is granted, the ultimate outcome is of course unknown. But it is certain that if the petition is not granted, the Second Circuit's decision will be a heavy constraint on union members in the construction industry when they consider whether or not to exercise their democratic rights.

CONCLUSION

The Respondents were not able to reconcile the express conflict between the Second and Seventh Circuits, between this case and Harris. They did not even try to reconcile the unexpressed, but nevertheless real, conflict between this case and other circuit cases extending LMRDA jurisdiction to claims against all persons operating under color of union authority who are engaged in schemes to suppress dissent within the union. Because of these conflicts, and because there is so much at stake for democratic unionism, this Petition should be granted.

Respectfully submitted,



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